Supreme Court, U.S.
FILED

No. 02-1531 APR 16 2003

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In The

Supreme Court of the United States

LAURA A. FINDLEY, et al.,

Petitioners,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

MALAKOFF DOYLE & FINBERG, P.C.
MICHAEL P. MALAKOFF
Counsel of Record
JAMES M. PIETZ
Suite 200, The Frick Building
437 Grant Street
Pittsburgh, PA 15219
(412) 281-8400

WILSON FRAME BENNINGER & METHENEY, P.L.L.C.
J. MICHAEL BENNINGER
PAUL T. FARRELL, JR.
151 Walnut Street
Morgantown, WV 26505
(304) 292-9429

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

124 pp

QUESTION PRESENTED

I. Does the prohibition against "selective prospectivity" recognized in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) (hereinafter "*Beam*"), and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993), apply to prohibit the use of "selective prospectivity" by the West Virginia Supreme Court of Appeals where, in a prior decision, that court announced a construction of a state statute and applied it retroactively to the parties before it, but subsequently limited its prior judicial decision to prospective effect in Petitioner's case in which the same cause of action was asserted, thereby treating similarly situated litigants differently?

This question presents two subsidiary questions:

A. Is the prohibition against "selective prospectivity" recognized in *Beam* and *Harper* based upon the Due Process and Equal Protection Clauses of the United States Constitution? And, if so:

B. Does *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), provide the state court below freedom to apply its own retroactivity rule in a "selectively prospective" manner notwithstanding that such application violates Federal Equal Protection and Due Process guarantees?

PARTIES TO THE PROCEEDING

The Petitioner is Laura A. Findley. The Respondent is State Farm Mutual Automobile Insurance Company. The state court below granted Nationwide Mutual Insurance Company's motion to intervene.

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The December 6, 2002 opinion of the state court below is reported. *Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d 807 (W.Va. 2002) (App. 1-40). The January 16, 2003 order denying rehearing (App. 67), and the January 23, 2003 order entering final judgment on all claims and all parties (App. 68-69), are unreported.

JURISDICTION

The state court below denied a timely petition for rehearing on January 16, 2003 (App. 67), and entered final judgment on all claims and all parties on January 23, 2003 (App. 68-69). By applying its judicial retroactivity doctrine *sua sponte* in its December 6, 2002 opinion, the state court below raised the question of selective prospectivity for the first time. Petitioner filed a timely Petition For Rehearing, arguing that the state court's selective application of retroactivity violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. App. 77-94. Where the grounds of a state court's decision supplies a new and unexpected basis for a claim of a federal right by the defeated party, the claim may be raised and preserved by way of a Petition For Rehearing. *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n. 3 (1996). Thus, the jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of the same amendment indicates that: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

STATEMENT

On February 18, 2000, the state court below issued the seminal decision of *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000) (hereinafter *"Broadnax"*). This decision construed an ambiguous provision in West Virginia's uninsured and underinsured motorist statute, W.Va. Code § 33-6-31(k) ("subsection k"), and then applied the construction retroactively to the parties in that case.

On July 21, 2000, the Petitioner asserted the same cause of action as asserted by the plaintiff in *Broadnax*. On appeal, the state court below, *sua sponte,* determined to apply subsection (k) prospectively as to Petitioner, even though this statute had been enacted in 1979 and had been applied retroactively in *Broadnax*. *Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d 807 (W.Va. 2002). The state court below therefore selectively applied subsection (k) to similarly situated persons.

A. The State Court Below Retroactively Applied Subsection (k) In The *Broadnax* Decision

Subsection (k) was enacted by the West Virginia Legislature and therefore took effect in 1979. Its purpose was to provide authorization for insurers to incorporate exclusions in contracts for automobile insurance. In *Bell v. State Farm Mut. Auto. Ins. Co.*, Syl. pt. 2, 157 W.Va. 623, 623-24, 207 S.E.2d 147, 148 (1974), the state court below had held that the incorporation of an exclusion to Uninsured Motorist ("UM") coverage was void and inoperative because it conflicted with statutory requirements in that all automobile policies were required to provide such coverage. *Id.*

The legislature, therefore, amended W.Va. Code § 33-6-31 in 1979 to add subsection (k) which provides methods by which insurers could incorporate exclusions into contracts of automobile insurance. Subsection (k) provided:

> (k) Nothing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein, *nor shall this section be construed as preventing any insurer from incorporating in such terms, conditions and*

> *exclusions as may be consistent with the premium charged.*

(emphasis added). In *Broadnax*, 208 W.Va. at 47, 537 S.E.2d at 893, the Supreme Court of Appeals, construed subsection (k), affirming that the statute authorizes insurers to incorporate exclusions, but only if they reduce premiums commensurate with the reduction in coverage created by the exclusion. In Syllabus Point 5, the court reiterated that when an insurer incorporates, into a policy of motor vehicle insurance, an exclusion pursuant to W.Va. Code § 33-6-31(k) (1995) (Repl.Vol.1996), the insurer must adjust the corresponding policy premium so that the exclusion is "consistent with the premium charged." *Id.*, 208 W.Va. at 38, 537 S.E.2d at 884. Then, in Syllabus Point 6, the court held that an insured had a cause of action to enforce this statutory requirement stating, "When an insurer has failed to satisfy the statutory criteria of W.Va. Code § 33-6-31(k) (1995) (Repl.Vol.1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy." *Id.* Accordingly, the court remanded the matter to the circuit court to determine the factual question as to whether the insurer had "appropriately adjusted" the insured's premium when it incorporated the exclusion into the policy of insurance. *Id.*, 208 W.Va at 48, 537 S.E.2d at 893.

B. The State Court Below Denied Petitioner's Claims Based Upon *Broadnax* By *Sua Sponte* Limiting *Broadnax* To Prospective Effect

The Petitioner filed a complaint on July 25, 2001, alleging the same cause of action asserted in *Broadnax*.

Petitioner sought declaratory relief and damages, alleging that Respondent had violated subsection (k) in incorporating numerous exclusions in its contracts of automobile insurance in West Virginia from 1989 until the present. App. 49-50. She specifically alleged that Respondent violated that statute by incorporating numerous exclusions including, *inter alia,* an "owned but not insured" exclusion and an "anti-stacking" exclusion. App. 60.

Discovery in the trial court demonstrated that Respondent never filed adjusted rates contemporaneous to the incorporation of exclusions from 1989 to the present. App. 59-60. During the trial court proceedings, the West Virginia legislature enacted a new law, HB 4670, on March 7, 2002, purporting to retroactively overrule the *Broadnax* decision. App. 70-73. Respondent then filed a dispositive motion raising HB 4670 as a defense, contending that it barred Petitioner's claims. App. 52. Subsequently, on August 1, 2002, the Circuit Court granted summary judgment to Respondent, and dismissed Petitioner's cause of action. App. 65-66.

The state court below affirmed in a decision dated December 6, 2002. Initially, the state court below ruled that HB 4670 could not bar Petitioner's claims because it could only be applied prospectively from the date of its enactment, March 7, 2002. App. 20-22. Nonetheless, the court found that Petitioner did not have standing because *Broadnax* was itself only to be applied prospectively from the date of its decision – February 18, 2000. In sum, according to the state court below, subsection (k) only had effect between February 18, 2000 and March 7, 2002, even though the West Virginia legislature had enacted it in 1979.

In reaching this ruling, the state court below, *sua sponte* applied its retroactivity rule previously established in *Bradley v. Appalachian Power,* 163 W.Va. 332, 256 S.E.2d 879 (1979). *Bradley* provided a methodology for determining whether to apply a judicial decision announcing a new rule of state common law retroactively or prospectively. Based partly on this Court's decision in *Chevron Oil Co. v. Hudson,* 404 U.S. 97, 106-07 (1971), *Bradley* requires the balancing of various factors. *Id.*, 208 W.Va. at 43, 256 S.E.2d at 889. Under *Bradley*, the state court below determined that its prior decision in *Broadnax* was not to be given retroactive effect, despite its own decision in *Broadnax* to apply subsection (k) retroactively. App. 30-31. Accordingly, it held that the cause of action afforded under W.Va. Code § 33-6-31(k), as interpreted by *Broadnax,* only applied to exclusions incorporated in policies after the date of its decision, February, 18, 2000. Therefore, it ruled that Petitioner did not have standing because Respondent's alleged conduct occurred prior to February 18, 2000.

Petitioner filed a timely Petition For Rehearing pursuant to W.Va.App.R. 24, specifically arguing that the state court below's *sua sponte* decision to apply *Broadnax* selectively violated the Due Process and Equal Protection Clauses of the United States Constitution. App. 74-90.

REASONS FOR GRANTING THE PETITION

It is respectfully submitted that certiorari be granted to prevent arbitrariness and to assure equality and fairness in the application of decisions made by a state's highest court on a question of state law. The same fundamental constitutional principles that prohibit the application of "selective prospectivity" to a rule of federal law applies with equal force to rules of state law. *Harper* and *Beam, supra*, p. i. All litigants, federal or state, are entitled to consistent, equal and fair treatment under the law.

I. Numerous State Courts, Including The State Court Below, Fail To Accord Equal Treatment To Similarly Situated Litigants By Engaging In Selective Prospectivity In Applying Their Judicial Retroactivity Doctrines

A substantial conflict exists among state courts as to whether a state's highest court is authorized under the Due Process and Equal Protection Clauses to selectively apply a judicial decision to similarly situated litigants. Many state court litigants, including the Petitioner, therefore cannot rely upon newly announced precedents on issues of state law, because many state courts, like the state court below, retain arbitrary discretion to refuse retroactive application in subsequent cases. Recognized standards of constitutional adjudication dictate that the same law must be applied to similarly situated litigants in order to achieve constitutional norms of fairness and equality under the law.

A. The Prohibition Against Selective Prospectivity Is Based Upon Basic Principles Of Constitutional Adjudication

When a court renders a decision, or overrules precedent, it is confronted with the question of whether to apply the newly rendered decision or prior precedent to the parties before it. *Beam*, 501 U.S. at 534-35. Resolution typically involves one of three "choices," namely, the decision may be (1) made fully retroactive; (2) made purely prospective, *i.e,* not applied to either the parties in the law-making decision, nor to conduct or events occurring before it; or (3) given "modified, or selective prospectivity" by applying it in the case it was announced, yet made prospective as to facts predating the pronouncement. *Id.* at 535-38. This Court rejected the use of the third choice in *Harper,* 509 U.S. at 97, and *Beam,* 501 U.S. at 537.

Harper and *Beam* provide that when a court has applied a new rule of federal law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or *res judicata*. *Beam* at *Id.* Significantly, selective prospectivity is a practice which has never been recognized as a proper rule in civil litigation. *Id.* at 537-38, citing Von Moschzisker, *Stare Decisis In Courts of Last Resort,* 37 Harv.L.Rev. 409, 425 (1924); Wasserstrom, *The Judicial Decision,* 69-72 (1961). It has only enjoyed a very brief "ascendency" in the law.[1]

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[1] For a very brief period, the use of "selective prospectivity" was countenanced by this Court. However, the dissents by Justice Harlan in *Desist v. United States,* 394 U.S. 244 (1969); *United States v. Estate of Donnelly,* 397 U.S. 286 (1970); and *Mackey v. United States,* 401 U.S. 667 (1971), led to its demise.

As explained in *Harper,* selective prospectivity is contrary to "basic norms of constitutional adjudication" which prohibit the "erection of selective temporal barriers" in civil cases. *Harper* at 97; *see also Reynoldsville Casket Co. v. Hyde,* 514 U.S. 749 (1995). The origin of this prohibition was derived from constitutional principles identified earlier by Justice Harlan. *See United States v. Johnson,* 457 U.S. 537, 546 (1982) (explaining the three "norms of constitutional adjudication"). Initially, "selective prospectivity" violates the fundamental legal precept that "litigants in similar situations should be treated the same":

> [S]elective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally . . . We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.

Beam at 537-38 (internal quotations and citation omitted). *See also, Griffith v. Kentucky,* 479 U.S. 314, 323 (1987).

Selective prospectivity is also contrary to the principle of constitutional adjudication that prohibits arbitrary applications of law to similarly situated litigants. *Beam* observed that precedent must be applied equally, stating, "It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis." *Id.* at 543. Because selective prospectivity sanctions a random choice of beneficiaries, it violates protection against arbitrary decisions. As Justice Harlan observed:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

Griffith, 479 U.S. at 323 (citation omitted).

The determination of the state court below that its retroactivity rule may be indiscriminately applied to retroactively benefit litigants in an initial case construing a statute, but then denied to similarly situated litigants in subsequent cases, clearly conflicts with these principles of constitutional adjudication. Under the Supremacy Clause, a state court cannot supplant this Court's retroactivity doctrine where it is based upon federal constitutional grounds. In *Harper*, this Court ruled:

> The Supremacy Clause, U.S. Const., art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, . . . cannot extend to their interpretations of federal law.

Id. at 100 (citations omitted). If the prohibition against selective prospectivity is based upon "basic norms of constitutional adjudication," *a fortiori,* it applies to state court interpretations of state law.

B. A Conflict Among State Courts And Federal Courts Applying State Law As To The Legality Of Selective Prospectivity Demonstrates Inconsistent, Unequal And Unfair Application Of Federal Constitutional Protections

A number of state courts have recognized that selective prospectivity presents Due Process and Equal Protection concerns. Others hold that this Court's decision in *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358 (1932), provides complete freedom to establish a state retroactivity doctrine without regard to the Federal Constitution. This conflict affects thousands of litigants who rely on state court decisions to guide their conduct or protect their interests. Therefore, it is respectfully submitted that this Court grant this Petition in order to resolve this conflict.

One group of courts adheres to the view that *Sunburst* completely insulates a state court's application of its retroactivity doctrine from all federal constitutional scrutiny. For example, the New Mexico Supreme Court in *Beavers v. Johnson Controls,* 118 N.M. 391, 881 P.2d 1376, 1382 (1994), ruled that has inherent power to decide whether to give a decision prospective, retroactive, or even selective prospective application, then expressly refused to prohibit selective prospective application, stating, "We therefore decline to follow the Supreme Court's lead in holding that we lack the power to apply a new rule prospectively . . . even though . . . the decision announcing the new rule has already been applied retroactively to the conduct of the litigants in the case in which the rule was announced." However, it also expressly noted that a federal constitutional question had not been presented.

Id. n. 8 ("The possibility that selective prospectivity might deprive parties in a subsequent case of equal protection of the laws raises an interesting question, but since the question is not presented here we have not researched it and do not address it.").

The *Beavers* decision has been construed by other courts and judges for the proposition that a state court has unlimited inherent authority to apply one of its decisions either prospectively or retroactively "without offending constitutional principles." *See, In Re Commitment Of Thiel,* 241 Wis.2d 439, 625 N.W.2d 321, 327 n. 6 (2001). Citing *Beavers,* the *Thiel* court explained that, "this principle of federalism permits each state to give full faith and credit to the juristic philosophy of the state and its conception of law, its origin and nature." *Id.*

Citing *Beavers* and *Thiel,* the dissent in the District of Columbia Court of Appeals case of *Davis v. Moore,* 772 A.2d 204, 239 (D.C. 2001), specifically urged the majority to reject the *Harper* prohibition against selective prospectivity stating: " . . . some state courts have declined to adopt the *Harper* rule, preferring to maintain the option to stay application of newly-announced rules when it would be inequitable to do so." *See also, City of New Bern v. New Bern-Craven Bd. of Ed.,* 338 N.C. 430, 450 S.E.2d 735 (1994) (indicating that where the rule to be applied retroactively or prospectively is one of state law, the court is free to apply that rule selectively to similarly situated litigants).

The United States Court of Appeals for the Third Circuit in the habeas corpus proceedings in *Fiore v. White,* 149 F.3d 221, 225 (3d Cir. 1998), *rev'd on other grounds,* 531 U.S. 225, 228 (2001), also appears to suggest that

state courts have complete freedom to apply judicial decisions on a selectively prospective basis without regard to constitutional limitations. It ruled that Pennsylvania courts had no constitutional obligation to apply all of their decisions retroactively. *Id.* Citing *Sunburst,* it also stated that state courts are free to adopt their own retroactivity rules without regard to the federal constitution. *Id.* Although this Court reversed the conviction in *Fiore* on federal due process grounds, *Fiore* can be read as authorizing state courts to engage in selective prospectivity.

In contrast, another line of state courts recognize that the application of a judicial decision on a selective basis presents federal constitutional problems. The majority opinion in *Davis v. Moore,* 772 A.2d 204 (D.C. 2001), exemplifies this reasoning. It granted rehearing to determine whether its retroactivity rule established in *Mendes v. Johnson,* 389 A.2d 781 (D.C. 1978), had been undermined by this Court's decisions in *Harper* and *Beam.* It held that retroactive application was mandated under this Court's precedent, ruling that, "If the principal thrust of *Griffith* and *Harper* was to end selective retroactivity, those cases mandate retroactive application here." *Id.* at 231.

Similarly, the Minnesota Supreme Court has recognized that selective application of a new rule on a prospective basis violates the rule that similarly situated litigants must be treated the same. *State v. Baird,* 654 N.W.2d 105, 111 n. 5 (2002). At issue in *Baird* was whether a new rule regarding self-defense that it announced prior in *State v. Glowacki,* 630 N.W.2d 392, 402 (Minn. 2001), applied retroactively. Recognizing that selective application would be improper, it ruled, "because we applied the rule we announced in *Glowacki* to the parties in that case, it is

inappropriate to determine now that *Glowacki* applies prospectively." *Baird* at *Id.*

The Hawaii Supreme Court in *State v. Garcia,* 96 Hawaii 200, 29 P.3d 919 (2001), likewise recognized the impropriety of selective prospectivity after *Harper* and *Beam.* At issue was whether its prior decision in *State v. Wilson,* 92 Hawaii 145, 987 P.2d 268 (1999), which interpreted an evidentiary exclusionary rule in connection with Hawaii's drunk driving law, was to be applied retroactively to similarly situated defendants. Tracing this Court's reasoning in *Harper* and *Beam,* it recognized that retroactive application was mandated in order to assure that similarly situated litigants were treated the same, and stated, "Because the newly announced rule was extended to *Wilson,* we can perceive no justification for withholding its application to those defendants who are similarly situated." *Garcia,* 29 P.3d at 933.

In a different context, the Court of Appeals of California recognized that *Harper* and *Beam* are premised upon Due Process and Equal Protection grounds. *See, Schimer v. Supreme Court of California,* 78 Cal.App.4th 703, 93 Cal.Rptr.2d 580 (2000) ("*Schimer I*") and *Schimer v. Supreme Court of California,* 96 Cal.App.4th 873, 117 Cal.Rptr.2d 497 (2002) ("*Schimer II*"). In *Schimer I,* the plaintiff sought an injunction for court rules established by the California Supreme Court regarding case publication, arguing that they violated the Due Process and Equal Protection standards mandated by *Beam* and *Harper* by barring publication of certain cases, similar to the result of selective prospectivity. *Id.,* 93 Cal.Rptr.2d at 585. Although *Schimer I* recognized that these constitutional standards applied, it nevertheless found that the new court rules prevented "selective prospectivity" by explicitly

providing for the publication of cases announcing a new rule. *Id.* at 586. *See also, Schimer II,* 117 Cal.Rptr.2d at 502 n. 4 ("This method of overruling precedent can violate the constitutional guarantees of due process and equal protection.").

These decisions demonstrate inconsistent treatment of basic federal constitutional principles by state courts.

II. The Application Of Selective Prospectivity Is Contrary To Standards Of Constitutional Adjudication Under The Equal Protection And Due Process Clauses Which Apply To State Courts

Certiorari should be granted because the application of selective prospectivity by the state court below is contrary to the Equal Protection and Due Process Clauses of the United States Constitution. Significantly, this Court's *Sunburst* decision grants freedom to state courts to give a decision of state law full retrospective or pure prospective effect, however, it does *not* insulate selective prospectivity from Federal Constitutional standards.

A. Selective Prospectivity Is Contrary To The Equal Protection And Due Process Clauses Of The Federal Constitution

Selective prospectivity allows courts to treat similarly situated litigants differently and to choose beneficiaries arbitrarily, in violation of the Equal Protection and Due Process Clauses of the Federal Constitution. The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. It "embodies a

general rule that States must treat like cases alike, but may treat unlike cases accordingly." *Vacco v. Quill,* 521 U.S. 793, 799 (1997) (citations omitted). Its purpose "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992) (citation omitted). *See also, Maxwell v. Dow,* 176 U.S. 581, 599 (1900) ("It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances.") Because selective prospectivity allows similarly situated litigants to be treated differently, it is clearly contradicts Equal Protection standards.

Similarly, the Due Process Clause protects against arbitrary applications of law to selected beneficiaries. It has been applied to prohibit a state from selectively applying a law to similarly situated litigants where "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). It is clearly arbitrary to selectively apply a new rule to some, but not all, similarly situated litigants. Thus, a court's right to selectively choose how, and to whom, a statute shall be applied is, in effect, a right to disregard the law. *Lynce v. Mathis,* 519 U.S. 433, 440 (1997) ("The specific prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects.").

In this context, the state court below announced a construction of a statute in *Broadnax* and applied it

retroactively to the litigants in that case.[2] In reliance, similarly situated persons commenced the same actions seeking to enforce the right of action. The state court below then reversed course and effectively changed the law back to its older version with respect to the similarly situated plaintiffs before it. This runs counter to a court's traditional function, which is to apply existing law to a case or controversy. *Beam,* 501 U.S. at 534 ("Courts are . . . in the business of applying settled principles and precedents of law to the disputes that come to bar."). If, instead, a court repeatedly changes the law, and selects chance beneficiaries, the Due Process Clause is violated.

The arbitrariness of the decision of the state court below is highlighted by the fact that no change in the law actually occurred. A change in the law occurs when a court expressly overrules a precedent upon which the contest "would otherwise be decided differently and by which the parties may previously have regulated their conduct." *Id.* Such a trigger for prospective application was *not* present here. *Broadnax* neither announced a new law, nor changed pre-existing law. Rather, it merely clarified what W.Va. Code § 33-6-31(k) had always meant. *See, Rivers v. Roadway Express,* 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision

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[2] The state court below erroneously believed that application of "selective prospectivity" was required to achieve equity. Therefore, it used a "balancing of equities" based on *Chevron, supra,* to determine whether to give its *Broadnax* decision prospective effect. *Beam,* however, expressly overruled *Chevron* balancing in instances of selective prospectivity, and relegated it to remedial issues. *Beam,* 501 U.S. at 540, and 544, respectively. *See also, Harper,* 509 U.S. at 98.

giving rise to the construction."); *Fiore v. White*, 531 U.S. 225, 228 (2001).

The state court below, therefore, did not change any law. Rather, it arbitrarily choose not to apply existing law to the controversy before the Court, which violates basic Due Process principles. In *Fiore,* the Pennsylvania Supreme Court answered a certified question presented to it by explaining that its prior decision in *Fiore v. White,* 562 Pa. 634, 757 A.2d 842 (2000), which construed the statute governing the defendant's conviction, had been a *clarification* thereof. Recognizing that the clarification related back to the statute's enactment date, this Court held that it would violate Due Process to convict a person for a crime which was not a crime when it was committed. 531 U.S. at 228-29. *See also*, *State v. Klayman*, 835 So.2d at 252, applying *Fiore,* stating, "if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, that were decided under the same version (i.e., the clarified version) of the applicable law."

Selective prospectivity violates federal Equal Protection and Due Process standards.

B. The *Sunburst* Decision Is Not Affected By The Prohibition Of Selective Prospectivity In State Judicial Retroactivity Doctrines

The so-called "*Sunburst* Doctrine" – the freedom of a state's highest court to establish its own retroactivity doctrine – is not implicated by the prohibition of "selective prospectivity" in state courts. *Great Northern Ry. Co. v.*

Sunburst Oil & Ref. Co., 287 U.S. 358 (1932). State courts remain free to apply new rules on a fully retroactive, or purely prospective, basis. *See*, *Beam*, 501 U.S. at 538 (selective prospectivity has never been a recognized norm and "appears never to have been endorsed in the civil context."). *Sunburst* does not provide a *carte blanche* to violate basic norms of constitutional adjudication via selective prospectivity.

In *Sunburst*, the Supreme Court of Montana ruled that its earlier construction of a state statute in *Doney v. Northern Pacific Ry. Co.*, 60 Mont. 209, 1999 P. 432 (1921), was erroneous and would not be followed in the future. *Sunburst*, 287 U.S. at 146-47. Nevertheless, the court ruled that the old construction in *Doney* would still apply to shippers and carriers who relied on it during its effect, including the plaintiff in *Sunburst*. The plaintiff in *Sunburst* argued that the Federal Constitution prohibited Montana's highest court from refusing to apply its new decision retroactively. *Id.* at 148-49. This Court disagreed, and held that the Federal Constitution does not prohibit a state court from applying a new rule fully retrospectively to all past litigants, or purely prospectively as to all future litigants, explaining that the "choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review, not the wisdom of their philosophies, *but the legalities of their acts*." *Id.* at 149 (emphasis added).

The acts at issue in *Sunburst* did not violate the Federal Constitution because all similarly situated litigants were treated the same. In that case, the Montana Supreme Court announced a new rule and applied it purely prospectively to all future contracts, yet applied the old rule fully retroactively for all past established

contracts, including the plaintiff's before the court. This Court, therefore, recognized that the application of a new rule fully retroactively, or purely prospectively, would not implicate Federal Constitutional constraints in any way whatsoever. Since, however, *Sunburst* did not involve, or even countenance, selective prospectivity, it did not, and cannot, authorize the application of selective prospectivity by a state's highest court.

CONCLUSION

Wherefore, it is respectfully requested that this Honorable Court accept certiorari.

Respectfully submitted,

MALAKOFF DOYLE & FINBERG, P.C.
MICHAEL P. MALAKOFF
Counsel of Record
JAMES M. PIETZ
Suite 200, The Frick Building
437 Grant Street
Pittsburgh, PA 15219
(412) 281-8400

WILSON FRAME BENNINGER & METHENEY, P.L.L.C.
J. MICHAEL BENNINGER
PAUL T. FARRELL, JR.
151 Walnut Street
Morgantown, WV 26505
(304) 292-9429

Attorneys for Petitioners

Dated: April 16, 2003

APPENDIX A

2002 WL 31747307

Supreme Court of Appeals of
West Virginia.

Laura A. FINDLEY, Individually and on behalf of
All Other Persons Similarly
Situated, Plaintiff Below, Appellant,
v.
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, Defendant Below,
Appellee,

Nationwide Mutual Insurance Company, Intervenor.

No. 30842.

Submitted Nov. 14, 2002.
Decided Dec. 6, 2002.
Concurring Opinion of Justice Starcher Dec. 13, 2002.
Concurring and Dissenting Opinion of
Justice McGraw Jan. 6, 2003.

J. Michael Benninger, Esq., *Paul T. Farrell, Jr.*, Esq., Wilson, Frame, Benninger & Metheney, PLLC, Morgantown, *James M. Pietz*, Esq., Malakoff, Doyle & Finberg, P.C., Pittsburgh, PA, for the Appellant.

Clarence E. Martin, III, Esq., *Susan R. Snowden*, Esq., *Ronald S. Rossi*, Esq., Martin & Seibert, L.C., Martinsburg, for the Intervenor.

Mary E. Alexander, Esq., President, *Jeffrey R. White*, Esq., Counsel, The Association of Trial Lawyers of America, Washington, DC, *William L. Frame*, Esq., Wilson, Frame, Benninger & Metheney, PLLC, Morgantown, for Amicus Curiae, The Association of Trial Lawyers of America.

Bert Ketchum, Esq., Greene Ketchum Bailey & Tweel, Huntington, for Amicus Curiae, West Virginia Trial Lawyers Association.

Catherine D. Munster, Esq., *James A. Varner, Sr.*, Esq., Debra Tedeschi Herron, Esq., McNeer, Highland, McMunn and Varner, L.C., Clarksburg, for the Appellee.

J. Michael Weber, Esq., *Dean A. Furner*, Esq., Spilman Thomas & Battle, PLLC, Parkersburg, for Amici Curiae, West Virginia Insurance Federation, West Virginia Chamber of Commerce, West Virginia Manufacturers Association, West Virginia Business and Industry Council, West Virginia Bankers Association, Builders Supply Association of West Virginia, West Virginia Association of Insurance and Financial Advisors, West Virginia Automobile and Truck Dealers Association, and The Professional Independent Insurance Agents of West Virginia.

DAVIS, Chief Justice.

The appellant herein and plaintiff below, Laura A. Findley, individually and in her representative capacity[1] [hereinafter collectively referred to as "Ms. Findley"], appeals from an August 1, 2002, order entered by the Circuit Court of Barbour County in favor of the appellee

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[1] Although Ms. Findley originally filed her suit against State Farm individually, during the proceedings underlying this appeal, she moved for, and was granted, permission to amend her complaint to transform it into a class action proceeding. Despite this procedural posture, we will nevertheless collectively refer to the plaintiffs below and appellants herein as "Ms. Findley" to maintain consistency with the circuit court's rulings and the parties' arguments. For further discussion of the class action status of this suit, see *infra* note 10 and accompanying text.

herein and defendant below, State Farm Mutual Automobile Insurance Company [hereinafter referred to as "State Farm"]. By the terms of that order, the circuit court concluded that State Farm was entitled to summary judgment because (1) the vehicle in which Ms. Findley was riding at the time of the accident was not an underinsured motor vehicle, and therefore, she was not entitled to recover underinsured motorist [hereinafter referred to as "UIM"] benefits from State Farm; (2) the multi-car discount contained in the applicable State Farm policy precluded the stacking of coverages under multiple State Farm policies available to Ms. Findley; and (3) the provisions of W.Va.Code §§ 33-6-30(b-c) (2002) (Supp.2002) barred Ms. Findley's cause of action.

On appeal to this Court, Ms. Findley argues that the circuit court erred by (1) retroactively applying W. Va.Code §§ 33-6-30(b-c); (2) concluding that she does not have standing to challenge, pursuant to *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000), State Farm's definition of an underinsured motor vehicle; (3) upholding the anti-stacking provisions contained in her State Farm motor vehicle insurance policy; and (4) denying her cross-motion for summary judgment. State Farm additionally asserts several cross-assignments of error urging the affirmance of the circuit court's rulings. Upon a review of the parties' arguments, the record designated for appellate consideration, and the parties' arguments, we affirm the decision of the Circuit Court of Barbour County. In summary, we find that (1) the provisions of W.Va.Code §§ 33-6-30(b-c) do not apply retroactively; (2) Ms. Findley cannot assert a claim for relief pursuant to our prior decision in *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000); (3) the anti-stacking exclusions contained in the State

Farm policy at issue herein are valid and enforceable; and (4) Ms. Findley is not entitled to judgment as a matter of law.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts upon which this proceeding is based were found by the circuit court as follows. On March 18, 2000, Ms. Findley was riding as a passenger in a 1987 Chevrolet Cavalier, which she jointly owned with her estranged husband John Findley[2] [hereinafter referred to as "Mr. Findley"] and of which she had been given exclusive use.[3] At the time of the single car accident, Rusty Hyde, who did not own an automobile and thus had no motor vehicle insurance, was driving the Cavalier with Ms. Findley's permission. Ms. Findley was injured as a result of this accident, and recovered under the $50,000 liability provisions of Mr. Findley's State Farm policy insuring said vehicle.[4]

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[2] Mr. and Ms. Findley were married on November 22, 1996.

[3] By order entered November 17, 1999, in connection with the Findleys' marital separation, Ms. Findley was awarded temporary relief, including the exclusive use and possession of the Chevrolet Cavalier.

[4] Mr. Findley had insured the Chevrolet Cavalier with State Farm on September 26, 1991, under State Farm Policy No. 232-7297-D24-48D. The coverage limits of this policy of motor vehicle insurance included $50,000 liability coverage and $50,000 underinsured motorist (UIM) coverage. Although it does not appear that Ms. Findley was specifically named as an insured on the declarations page of this policy until April 6, 2000, she presumably was nevertheless covered thereby as Mr. Findley's spouse.

When these coverage limits proved to be insufficient to fully recompense her injuries, Ms. Findley attempted to also collect under the UIM provisions of this policy, as well as under the UIM provisions of two other policies of motor vehicle insurance held by Mr. Findley,[5] all of which coverage was denied by State Farm. In support of its denial of coverage, State Farm relied upon the policy definitions of UIM coverage and underinsured motor vehicle. Pursuant to this policy, "underinsured motorist coverage" is described as follows:

> [w]e will pay for damages for **bodily injury** and **property damage** an **insured** is legally entitled to collect from the owner or driver of an **underinsured motor vehicle**. The bodily **injury** or **property damage** must be caused by accident arising out of the operation, maintenance, or use of an **underinsured motor vehicle**.

An "underinsured motor vehicle" is further defined to exclude "a land motor vehicle . . . insured under the liability coverage of this policy[.]"[6] Moreover, the policy in

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[5] These additional policies of motor vehicle insurance, issued by State Farm and purchased by Mr. Findley, consisted of State Farm Policy No. 8580-C24-48, issued on June 29, 1998, and insuring a 1985 Chevrolet S10 Blazer, and State Farm Policy No. 257-9255-A30-48B, issued on January 30, 1996, and insuring a 1999 Ford E250 Van.

[6] The circuit court found, with respect to this policy provision, that State Farm submitted Amendatory Endorsement 6069AG, containing such language, to the West Virginia Insurance Commissioner for approval in November, 1989. The Commissioner approved this definition of underinsured motor vehicle in December, 1989, and this Amendatory Endorsement became effective January 1, 1990. Pursuant to the circuit court's findings of fact, "[n]o evidence has been propounded demonstrating that State Farm adjusted premiums from inclusion of these amendatory endorsements in 1989, although State

(Continued on following page)

question contains an anti-stacking exclusion: "If other underinsured motor vehicle coverage issued by us to you, your spouse, or any relative applies, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability."[7]

Farm contends the overall premium was consistent with the policy provisions." *See infra* note 7.

[7] With respect to the above-quoted anti-stacking language, the circuit court found that, on August 16, 1995, State Farm submitted to the Insurance Commissioner a form filing requisite to the incorporation of such an exclusion in its policies of motor vehicle insurance. Presumably, this language, contained in Amendatory Endorsement 6090AQ, received the Commissioner's approval. The circuit court also found that State Farm "did not decrease UIM premiums in 1995 when anti-stacking language was re-incorporated into the automobile insurance policy in Amendatory Endorsement 6090AQ, but alleges the premium charged was consistent with the policy provisions."

Furthermore, relevant to both Amendatory Endorsements at issue herein, the circuit court noted that

> It is the position of the Insurance Commissioner's Office that:
>
> a. It is the exclusive duty and responsibility of the Insurance Commissioner's Office to insure that the benefits of insurance policies are reasonable in relation to the premium charged. "Exclusions are consistent with the premiums charged when the Rates and Forms Division of the Insurance Commissioner's Office approves them."
>
> b. In determining the appropriate premium adjustment for purposes of West Virginia Code § 33-6-31(k), numerous factors must be considered. Thus, the addition of an exclusion may quite properly *not* result in a premium reduction because the effect of the exclusion is offset by the increases produced by the other factors.

(Citations omitted).

Thereafter, Ms. Findley instituted the underlying declaratory judgment action[8] against State Farm in the Circuit Court of Barbour County on November 21, 2000. Subsequently, on May 8, 2001, Ms. Findley moved to amend her complaint[9] to convert her suit into a class action proceeding;[10] the circuit court granted Ms. Findley's

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[8] Declaratory judgment actions are governed by W. Va.Code § 55-13-1, *et seq.* W. Va.Code § 55-13-2 (1941) (Repl.Vol.2000) provides

> [a]ny person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

[9] Ms. Findley filed her first amended complaint on November 22, 2000, wherein she sought underinsured motorist (UIM) coverage from State Farm.

[10] In support of her motion to convert her suit into a class action, Ms. Findley averred

> [t]his class action is brought on behalf of West Virginia State Farm policy owners and insureds as to whom State Farm has overcharged and/or denied Underinsured Motorist (UIM) coverage. For UIM coverage to be effective under West Virginia law, the insurer must offer policyholders, as part of the insurance contract, an option to purchase full, unlimited, unrestricted UIM coverage which includes a policyholder's right to reject full UIM coverage and pay lower premiums for limited UIM coverage. State Farm, however, fails to contract for UIM coverage in the manner mandated by West Virginia law. Thus, thousands of West Virginia State Farm policyholders and/or insureds have been overcharged for and/or illegally denied UIM coverage.

See generally W. Va. R. Civ. P. 23 (setting forth criteria for class action proceedings). See also note 1, *supra,* discussing class action status in the case *sub judice.*

motion by order entered July 10, 2001. Ms. Findley then filed her First Amended Class Action Complaint on July 25, 2001. Following discovery, State Farm moved for summary judgment on February 14, 2002, and Ms. Findley cross-moved for summary judgment on April 10, 2002. On May 16, 2002, State Farm filed a second motion for summary judgment, asserting additional theories upon which it based its entitlement to relief. After a hearing on these motions, the circuit court ultimately ruled in favor of State Farm by order entered August 1, 2002, concluding that:

[1.] State Farm is entitled to the granting of its First Motion for Summary Judgment (filed February 14, 2002), on the application of the "intra-policy setoff" provision, for the following reasons:

> a. The Court finds as a matter of law that the subject vehicle is not an "underinsured motor vehicle" under the applicable insurance policy, as the definition of underinsured motor vehicle clearly and unambiguously precludes UIM coverage for a vehicle insured under the same policy for liability purposes. *See Thomas v. Nationwide Mutual Insurance Company,* 188 W.Va. 640, 425 S.E.2d (1992); *Alexander v. State [Automobile] Mutual Insurance Company,* 187 W.Va. 72, 415 S.E.2d 618 (1992).
>
> b. The definition of "underinsured motor vehicle" as contained within the applicable State Farm policy originally issued September 26, 1991 is consistent with the statutory requirements of the West Virginia Code and is in accord with public policy.
>
> c. Moreover, as found by our state supreme court, to declare this provision invalid would

"emasculate" this State's underinsured motorist statutory provisions, and, in effect, would transform the underinsured coverage into liability coverage. This finding is controlled by the West Virginia Supreme Court of Appeals rulings in *Thomas v. Nationwide Mutual Insurance Company,* 188 W.Va. 640, 425 S.E.2d 595 (1992); and *Alexander v. State Automobile Mutual Insurance Company,* 187 W.Va. 72, 415 S.E.2d 618 (1992).

d. The plaintiff's [Ms. Findley's] *Broadnax* arguments cannot be applied to this provision of the subject policy. The policy in question was issued September 26, 1991. Endorsement 6069AG received approval in December 1989 and became effective January 1, 1990, prior to issuance of the subject policy. If a challenge to the endorsement could be brought, the Court is of the opinion is [sic] could only be done by persons owing policies on January 1, 1990, alleging benefits were deleted from their policies without corresponding adjustments to premiums.

[2.] State Farm is entitled to the granting of its First Motion for summary judgment on the issue of Laura Findley's stacking claim in light of the clear and unambiguous exclusion prohibiting stacking, for which John Findley received a multi-car discount.

The issue of whether Laura Findley has standing to [assert] a "Broadnax" claim is factually in dispute. However, the Court finds the "Broadnax" claim not applicable as hereinafter set forth.

[3.] State Farm is also entitled to summary judgment as a matter of law for the reasons set forth in its Second Motion for Summary Judgment as the plaintiff's cause of action is barred

by the provisions of West Virginia Code § 33-6-30(b) and (c) for the following reasons:

a. West Virginia Code § 33-6-30(b) and (c) is a clarification of existing law and does not overrule *Mitchell v. Broadnax.*

b. As clarified by West Virginia Code § 33-6-30(b) and (c), nothing in *Broadnax* or West Virginia Code § 33-6-31(k) requires a *quid pro quo* premium adjustment for the incorporation of policy terms and exclusions.

c. *Broadnax* does not require an overall premium reduction if it is shown that the policy, with the exclusions, has an appropriate premium for the coverage provided.

d. As State Farm's policy language and premium rates were approved by the West Virginia Insurance Commissioner's Office prior to use, State Farm has met its statutory burden of demonstrating that the coverage afforded, including definitions and exclusions, were "consistent with the premium charged."

e. The language contained within West Virginia Code § 33-6-30(b) and (c) expresses the Legislature's intention for the same to apply to existing cases.

f. As a clarification of existing law, West Virginia Code § 33-6-30(b) and (c) is to be retroactively applied. *See Hutchens v. Progressive Paloverde Insurance Company, et al.,* [211 F.Supp.2d 788 (S.D.W.Va.2002)].

. . . .

> [4.] The plaintiff's cross-motion for summary judgment should be denied for all of the reasons set forth above[.]

From these rulings, Ms. Findley appealed to this Court. In conjunction with her Petition for Appeal, she moved this Court to expedite its consideration thereof given that "[t]his matter will provide controlling precedent for numerous civil actions pending in circuit courts throughout the State of West Virginia, gives rise to constitutional implications regarding recent remedial legislation, and impacts thousands of State Farm insureds residing in the State of West Virginia." By orders entered October 10, 2002, we granted said motion and granted Ms. Findley's Petition for Appeal. Thereafter, Nationwide Mutual Insurance Company [hereinafter referred to as "Nationwide"], who earlier had been granted leave to appear as an Amicus Curiae to this proceeding, moved to intervene[11] herein. In so moving, Nationwide averred that it was currently defending a class action in the Circuit Court of Taylor County with issues virtually identical to those raised herein; by order entered November 12, 2002, we granted Nationwide's motion, according it intervenor status.

II.

STANDARD OF REVIEW

Procedurally, this matter arises as an appeal from the circuit court's grant of summary judgment to State Farm

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[11] *See generally* W. Va. R.App. P. 22 (establishing intervention criteria).

and denial of such relief to Ms. Findley. In such matters, we typically apply a plenary review to the circuit court's ruling. "A circuit court's entry of summary judgment is reviewed *de novo.*" Syl. pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). Similarly, we previously have stated, and now so hold, that this Court "review[s] *de novo* . . . the denial of [a] motion for summary judgment," *Adkins v. Chevron, USA, Inc.,* 199 W.Va. 518, 522, 485 S.E.2d 687, 691 (1997) (per curiam), where such a ruling is properly reviewable by this Court. *See, e.g.,* Syl. pt. 8, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963) ("An order denying a motion for summary judgment is merely interlocutory, leaves the case pending for trial, and is not appealable except in special instances in which an interlocutory order is appealable."). *See also* Section III.D., *infra.*

Also at issue in this proceeding is the circuit court's interpretation of the relevant statutory language. To this decision, we likewise employ a *de novo* standard of review. *See, e.g.,* Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia,* 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."); Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

Lastly, we are called upon to interpret the pertinent portions of the State Farm policy of motor vehicle insurance upon which this proceeding is based. We recently held that "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a

question of law." Syl. pt. 1, *Tennant v. Smallwood,* 211 W.Va. 703, 568 S.E.2d 10 (2002). Therefore, we will review anew the circuit court's ruling in this regard. *See, e.g.,* Syl. pt. 1, *Appalachian Power Co.,* 195 W.Va. 573, 466 S.E.2d 424; Syl. pt. 1, *Chrystal R.M.,* 194 W.Va. 138, 459 S.E.2d 415. With these standards in mind, we proceed to consider the merits of the parties' arguments.

III.

DISCUSSION

On appeal to this Court, Ms. Findley raises four assignments of error charging that the circuit court erred by (1) retroactively applying W. Va.Code §§ 33-6-30(b-c) (2002) (Supp.2002); (2) concluding that she does not have standing to challenge, pursuant to *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000), State Farm's definition of an underinsured motor vehicle; (3) upholding the anti-stacking provisions contained in her State Farm motor vehicle insurance policy; and (4) denying her cross-motion for summary judgment. In response to the issues raised by Ms. Findley, State Farm asserts cross-assignments of error in support of the circuit court's rulings, namely that the circuit court's order should be affirmed based upon (1) the filed rate doctrine; (2) Ms. Findley's failure to exhaust her administrative remedies relative to challenging State Farm's previously approved rates and forms; (3) the separation of powers doctrine; and (4) the adverse effect Ms. Findley's collateral attack on the rate making process would have on State Farm's

constitutional rights. We will address each of these arguments in turn.[12]

A. Retroactivity of W. Va.Code §§ 33-6-30(b-c)

Ms. Findley first contends that the circuit court erred by affording W. Va.Code §§ 33-6-30(b-c) (2002) (Supp.2002) retroactive effect rather than applying these statutory provisions prospectively. In this regard, the circuit court ruled that, "[a]s a clarification of existing law, West Virginia Code § 33-6-30(b) and (c) is to be retroactively applied."[13] To support her contentions, Ms. Findley relies upon various legislative enactments and court decisions, including the Contracts Clauses of the United States and West Virginia Constitutions,[14] legislative directives regarding retroactivity,[15] and characterization of the subject

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[12] At this juncture, we wish to thank the numerous Amici Curiae for appearing in this proceeding. We will consider their arguments in conjunction with those of the parties. Likewise, we will consider the arguments of the intervenor herein, Nationwide Mutual Insurance Company, in connection with those advanced by State Farm.

[13] In this regard, the circuit court also determined that "[r]etroactive application of West Virginia Code § 33-6-30(b) and (c) does not impermissibly infringe upon the constitutional Contracts Clause[.]"

[14] *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligations of Contracts."); W. Va. Const. art. III, § 4 (similar).

[15] *See* W. Va.Code § 2-2-10(bb) (1998) (Repl.Vol.2002) ("A statute is presumed to be prospective in its operation unless expressly made retrospective[.]"). *See also* Syl. pt. 2, in part, *Conley v. Workers' Comp. Div.*, 199 W.Va. 196, 483 S.E.2d 542 (1997) ("A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute." (internal quotations and citations omitted)).

statute as a "special interpretive statute"[16] or "declaratory statute"[17]. State Farm, in rejecting Ms. Findley's arguments, likewise cites to numerous authorities to support its assertion that retroactive application of these statutory provisions does not impermissibly impair contractual rights in violation of the Contracts Clause[18] and is necessitated by the clear and unambiguous language of W. Va.Code § 33-6-30.[19] State Farm also contends that Ms.

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[16] *See* 1A *Sutherland on Statutory Construction* § 27.4, at 632-33 (6th ed.2002 rev.) ("The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature considers inaccurate. Where such statutes are given any effect, the effect is prospective only. Any other result would make the legislature a court of last resort." (footnotes omitted)).

[17] *See State ex rel. White v. Wirt County Court,* 63 W.Va. 230, 245, 59 S.E. 884, 982 (1907) (Miller, J., dissenting) (indicating that "[a] declaratory statute . . . put[s] an end to doubt as to what is the common law or the meaning of another statute, and . . . declares what it is and ever has been" (internal quotations and citation omitted)). *See also United States v. Claflin,* 97 U.S. 546, 549, 24 L.Ed. 1082, 1084 (1878) ("[A] declaratory act, or an act directing how a former act shall be construed, is inoperative on the past[.]").

[18] *See* Syl. pt. 4, *Shell v. Metropolitan Life Ins. Co.,* 181 W.Va. 16, 380 S.E.2d 183 (1989) ("In determining whether a Contract Clause violation has occurred, a three-step test is utilized. The initial inquiry is whether the statute has substantially impaired the contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the legislation. Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.").

[19] *See United States v. $80,180.00 in U.S. Currency,* 303 F.3d 1182, 1185 (9th Cir.2002) ("When deciding whether a statutory provision applies retroactively to pending cases, we look to the text and legislative history of the provision to determine if Congress manifested a clear intent regarding the scope of the law's applicability.").

Findley cannot assert a new theory on appeal, *i.e.*, denominating W. Va.Code § 33-6-30 to be a "special interpretive statute," that she did not advance to the circuit court during the proceedings below.

Having considered both parties' arguments, we find that the issue of whether W. Va.Code §§ 33-6-30(b-c) should be applied retroactively may easily be resolved by reference to this State's statutory law and judicial precedent concerning retroactivity. Before examining the precise statute at issue before us, however, it is necessary to first briefly review the context within which such amendments were enacted.

The statute in question, W. Va.Code § 33-6-30, was amended by the Legislature following this Court's decision in *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000). In that case, we were called upon to interpret a related statutory provision, W. Va.Code § 33-6-31(k) (1995) (Repl.Vol.1996),[20] which states that "[n]othing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein, nor shall this section be construed as preventing any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged." Our interpretation of this language in *Mitchell* resulted in the following holdings:

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[20] W. Va.Code § 33-6-31 has been amended since our decision in *Mitchell v. Broadnax,* but the subsection under consideration therein has remained unchanged. *Compare* W. Va.Code § 33-6-31(k) (1995) (Repl.Vol.1996) *with* W. Va.Code § 33-6-31(k) (1998) (Repl.Vol.2000).

> When an insurer incorporates, into a policy of motor vehicle insurance, an exclusion pursuant to W. Va.Code § 33-6-31(k) (1995) (Repl.Vol.1996), the insurer must adjust the corresponding policy premium so that the exclusion is "consistent with the premium charged."
>
> When an insurer has failed to satisfy the statutory criteria of W. Va.Code § 33-6-31(k) (1995) (Repl.Vol.1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy.

Syl. pts. 5-6, *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882.

Thereafter, the Legislature, in response to this Court's decision in *Mitchell,* amended W. Va.Code § 33-6-30 (2002) (Supp.2002). In relevant part, the amendatory language provides

> (b) The Legislature finds:
>
> (1) That consumers and insurers both benefit from the legislative mandate that the insurance commissioner approve the forms used and the rates charged by insurance companies in this state;
>
> (2) That certain classes of persons are seeking refunds of insurance premiums and seeking to void exclusions and other policy provisions on the basis that insurance companies allegedly failed to provide or demonstrate a reduction in premiums charged in relation to certain terms or exclusions incorporated into policies of insurance;
>
> (3) That historically, as a prerequisite to a rate or form being approved, neither the Legislature

nor the insurance commissioner has ever required that the insurer demonstrate that there was a specific premium reduction for certain exclusions incorporated into policies of insurance;

(4) That the provisions of this chapter were enacted with the intent of requiring the filing of all rates and forms with the insurance commissioner to enable the insurance commissioner to review and regulate rates and forms in a fair and consistent manner;

(5) That the provisions of this chapter do not provide and were not intended to provide the basis for monetary damages in the form of premium refunds or partial premium refunds when the form used and the rates charged by the insurance company have been approved by the insurance commissioner;

(6) That actions seeking premium refunds or partial premium refunds have a severe and negative impact upon insurers operating in this state by imposing unexpected liabilities when insurers have relied upon the insurance commissioner's approval of the forms used and the rates charged insureds; and

(7) That it is in the best interest of the citizens of this state to ensure a stable insurance market.

(c) *Nothing in this chapter may be construed as requiring specific line item premium discounts or rate adjustments corresponding to any exclusion, condition, definition, term or limitation in any policy of insurance, including policies incorporating statutorily mandated benefits or optional benefits which as a matter of law must be offered.* Where any insurance policy form, including any endorsement thereto, has been approved by the

> commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter. *It is the intent of the Legislature that the amendments in this section enacted during the regular session of two thousand two are: (1) A clarification of existing law as previously enacted by the Legislature, including, but not limited to, the provisions of subsection (k), section thirty-one of this article; and, (2) specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of Mitchell v. Broadnax*, [208 W.Va. 36,] *537 S.E.2d 882 (W.Va.2000)*. These amendments are a clarification of the existing law as previously enacted by this Legislature.

(Emphasis added). It is this statutory language, particularly the Legislature's clarification of the effect of W. Va.Code § 33-6-31(k) and this Court's holding in *Mitchell v. Broadnax* enunciated in subsection *c,* which the circuit court found to be retroactive, and which we are called upon to examine in the case *sub judice.*

When determining whether a statute or statutory amendment should be applied retroactively, we are guided by the Legislature's own pronouncement that

> [t]he following rule[ ] shall be observed in the construction of statutes, unless a different intent on the part of the Legislature be apparent from the context:
>
> . . . .

> (bb) A statute is presumed to be prospective in its operation unless expressly made retrospective[.]

W. Va.Code § 2-2-10(bb) (1998) (Repl.Vol.2002). Applying this provision, we have understood it to mean that "'[t]he presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.' Pt. 4, syllabus, *Taylor v. State Compensation Commissioner,* 140 W.Va. 572[, 86 S.E.2d 114 (1955)]." Syl. pt. 1, *Loveless v. State Workmen's Comp. Comm'r,* 155 W.Va. 264, 184 S.E.2d 127 (1971). *Accord* Syl. pt. 2, *Conley v. Workers' Comp. Div.,* 199 W.Va. 196, 483 S.E.2d 542 (1997); *State v. Bannister,* 162 W.Va. 447, 453, 250 S.E.2d 53, 56 (1978). Thus, "[t]he general rule is that statutes are construed to operate in the future only and are not given retroactive effect unless the legislature clearly expresses its intention to make them retroactive." *Loveless,* 155 W.Va. at 266, 184 S.E.2d at 129 (citations omitted).

Despite this general rule of prospectiveness, we have nevertheless determined that "[s]tatutory changes that are purely procedural in nature will be applied retroactively." Syl. pt. 1, *Joy v. Chessie Employees Fed. Credit Union,* 186 W.Va. 118, 411 S.E.2d 261 (1991). This is so because legislative enactments that do not affect substantive rights are less likely to unconstitutionally infringe upon the rights of those relying upon the statutory language at issue. *See Public Citizen, Inc. v. First Nat'l Bank in Fairmont,* 198 W.Va. 329, 335, 480 S.E.2d 538, 544 (1996) (observing that, "[i]n these situations, the reliance interest that is the foundation of the interpretive principle limiting retroactive application is not engaged"). *See also Landgraf*

v. USI Film Products, 511 U.S. 244, 266, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229, 253 (1994) ("The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration.").

Where, however, "a new . . . provision would, if applied in a pending case, attach a new legal consequence to a completed event, then it will not be applied in that case unless the Legislature has made clear its intention that it shall apply." *Id. See also Gribben v. Kirk,* 197 W.Va. 20, 26, 475 S.E.2d 20, 26 (1996) (per curiam) (observing that the Legislature's "unmatched power does not allow [it] to retroactively change statutes so as to sweep away vested property rights" (citations omitted)); *Lester v. State Comp. Comm'r,* 123 W.Va. 516, 521, 16 S.E.2d 920, 924 (1941) (noting that legislation cannot be made retroactive "when the effect will be to impair the obligation of contracts or to disturb vested rights" (internal quotations and citation omitted)), *overruled on other grounds by Sizemore v. State Workmen's Comp. Comm'r,* 159 W.Va. 100, 219 S.E.2d 912 (1975). Indeed, we specifically have held that

> "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application." Syllabus Point 2, *Public Citizen, Inc. v. First National Bank in Fairmont,* 198 W.Va. 329, 480 S.E.2d 538 (1996).

Syl. pt. 2, *Smith v. West Virginia Div. of Rehabilitative Servs. & Div. of Pers.,* 208 W.Va. 284, 540 S.E.2d 152 (2000).

In the case *sub judice,* the legislative amendments to W. Va.Code §§ 33-6-30(b-c) are most certainly substantive in nature. The effect of such amendatory language is to extinguish any litigable rights that have accrued as a result of this Court's holding in *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000), and to foreclose lawsuits that have been initiated as a result thereof. However, absent explicit statutory language or a clear expression of legislative intent that such amendments are to apply retroactively, we are directed, by the Legislature, itself, to afford them prospective only application. *See* W. Va.Code § 2-2-10(bb). *See also Hughes v. Washington,* 389 U.S. 290, 296-97, 88 S.Ct. 438, 442, 19 L.Ed.2d 530, 535-36 (1967) (Stewart, J., concurring) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."); *Mildred L.M. v. John O.F.,* 192 W.Va. 345, 351 n. 10, 452 S.E.2d 436, 442 n. 10 (1994) ("It has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of action, suits, or vested property rights." (emphasis and citation omitted)); *State v. Hensler,* 187 W.Va. 81, 83, 415 S.E.2d 885, 887 (1992) (per curiam) ("[D]ue process places a limitation on retroactive judicial application of statutory enactments which precludes the court from effecting a result which the legislature is barred from achieving as a result of the *ex post facto* prohibition." (citation omitted)).[21] Accordingly, we disagree with the circuit court's ruling to the contrary.

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[21] Our decision of this issue is contrary to the conclusion reached by the United States District Court for the Southern District of West

(Continued on following page)

B. Standing

Ms. Findley next argues that the circuit court incorrectly found that she does not have standing to challenge, pursuant to *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000), State Farm's definition of an underinsured motor vehicle. In the subject policy, the definition of an "underinsured motor vehicle" specifically excludes "a land motor vehicle . . . insured under the liability coverage

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Virginia during its assessment of the retroactivity of W. Va.Code § 33-6-30, and upon which the circuit court relied in rendering its decision. *See Hutchens v. Progressive Paloverde Ins. Co.,* 211 F.Supp.2d 788, 794 (S.D.W.Va.2002) (concluding that W. Va.Code § 33-6-30 has retroactive effect). We note, however, that this Court is not bound by this authority, and, in this regard, we have specifically held that "[t]he decision of the highest court of a State in the construction of its statutes . . . is the controlling rule of decision in federal courts, where there is no federal question." Syl. pt. 3, in part, *Clarksburg Elec. Light Co. v. City of Clarksburg,* 47 W.Va. 739, 35 S.E. 994 (1900). *Accord Louisville, New Orleans & Texas Ry. Co. v. Mississippi,* 133 U.S. 587, 591, 10 S.Ct. 348, 349, 33 L.Ed. 784, 785 (1890) ("[T]he construction of [a] statute of the State by its highest court . . . must be accepted as conclusive[.]"); *State ex rel. Strickland v. Melton,* 152 W.Va. 500, 513, 165 S.E.2d 90, 98 (1968) (refusing to adopt federal court's construction of West Virginia statute, recognizing that "this Court is not bound by and is not required to adhere to such interpretation" where the statute at issue had not been "interpreted by any prior decision of this Court"); *Clarksburg Elec. Light Co.,* 47 W.Va. at 746, 35 S.E. at 996 ("The decision of the state court of last resort upon rights dependent alone upon its law, its statutes, is conclusive upon the Federal judiciary."). *See also* Syl. pt. 4, *State v. Wender,* 149 W.Va. 413, 141 S.E.2d 359 (1965) ("In construing our state constitution, the Supreme Court of Appeals is not bound by rulings of courts of other states or of the United States Supreme Court.").

of this policy."[22] During its deliberation and decision of this matter, the circuit court determined that

> [t]he definition of "underinsured motor vehicle" as contained within the applicable State Farm policy originally issued September 26, 1991 is consistent with the statutory requirements of the West Virginia Code and is in accord with public policy.
>
> . . . .
>
> The plaintiff's [Ms. Findley's] *Broadnax* arguments cannot be applied to this provision of the subject policy. The policy in question was issued September 26, 1991. Endorsement 6069AG received approval in December 1989 and became effective January 1, 1990, prior to issuance of the subject policy. If a challenge to the endorsement could be brought, the Court is of the opinion is could only be done by persons owing policies on January 1, 1990, alleging benefits were deleted from their policies without corresponding adjustments to premiums.[23]

(Footnote added). On appeal to this Court, Ms. Findley argues that the circuit court improperly denied her standing to assert her claim when she is a proper party to bring a declaratory judgment action pursuant to W. Va.Code

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[22] This language was added to State Farm policies of motor vehicle insurance on January 1, 1990, through Amendatory Endorsement 6069AG. *See supra* note 6 and accompanying text.

[23] The circuit court further found that Ms. Findley's "'Broadnax' claim [was] not applicable."

§ 55-13-2 (1941) (Repl.Vol.2000).[24] State Farm responds, however, that Ms. Findley lacked standing to assert the claims in this proceeding and that the circuit court's ruling on this point should be affirmed.

Given the procedural posture of the instant appeal, the questions presented for our consideration by this assignment of error are whether Ms. Findley has standing to assert a claim pursuant to the Declaratory Judgment Act, W. Va.Code § 55-13-1, *et seq.*, and to obtain the relief she seeks thereunder in accordance with this Court's holdings in *Mitchell v. Broadnax.* Generally, standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1413 (7th ed.1999). More specifically, it is well-recognized, and we now so hold, that

> [s]tanding . . . is comprised of three elements: First, the party . . . [attempting to establish standing] must have suffered an "injury-in-fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, *it must be likely that the injury will be redressed through a favorable decision of the court.*

Coleman v. Sopher, 194 W.Va. 90, 95 n. 6, 459 S.E.2d 367, 372 n. 6 (1995) (emphasis added). *Accord Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136,

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[24] For the text of W. Va.Code § 55-13-2 (1941) (Repl.Vol.2000), see *supra* note 8.

119 L.Ed.2d 351, 364 (1992); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700, 709 (1982); *Guido v. Guido,* 202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998) (per curiam).

Furthermore,

> [s]tanding does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, . . . the standing inquiry requires careful judicial examination . . . to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*"

International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72, 77, 111 S.Ct. 1700, 1704, 114 L.Ed.2d 134, 143 (1991) (quoting *Allen v. Wright,* 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556, 570 (1984)) (emphasis in original) (additional citation omitted). *Accord Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343, 354 (1975) ("In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue[.]" *Flast v. Cohen,* 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, 961 (1968) (footnote omitted). *Accord Louisiana Environmental Action Network v. Browner,* 87 F.3d 1379, 1382, 318 U.S.App. D.C. 370, 373 (1996) ("Our standing inquiry focuses on the appropriateness of a party bringing the questioned controversy to the court.");

American Alternative Energy Partners II v. Windridge, Inc., 42 Cal.App.4th 551, 559, 49 Cal.Rptr.2d 686, 691 (1996) ("[S]tanding to sue – the real party in interest requirement – goes to the existence of a cause of action, *i.e.*, whether the plaintiff has a right to relief.").

This requirement of the propriety of a party to assert a particular claim and his/her likelihood of success thereon is echoed in our case law discussing standing in the context of declaratory judgment actions. "It is a primary requirement of the Declaratory Judgments Act that plaintiffs demonstrate they have standing to obtain the relief requested." *Shobe v. Latimer,* 162 W.Va. 779, 784, 253 S.E.2d 54, 58 (1979). As Ms. Findley's declaratory judgment action is premised upon her claim for relief pursuant to *Mitchell v. Broadnax,* because the subject policy language allegedly does not comport with the requirements of our holdings therein, we must thus decide whether she is entitled to assert such a cause of action.

Under the facts of the case *sub judice,* it is apparent that State Farm incorporated the challenged policy language, whereby it limited its definition of an underinsured motor vehicle, on January 1, 1990, following the Commissioner's approval thereof. Additionally, the record does not indicate that this challenged exclusionary language has been amended, altered, or otherwise modified since its initial incorporation into policies of motor vehicle insurance in 1990. Subsequently, on September 26, 1991, Mr. Findley contracted with State Farm for the motor vehicle insurance coverage at issue herein. Although Ms. Findley ultimately has become an insured and a policyholder

under this insurance policy,[25] her attempt to assert a claim for relief in this context is effectively a request that this Court retroactively apply our holdings in *Mitchell v. Broadnax* so as to bring within its scope an insurance contract which was entered into before this Court's decision therein and which contract has contained the allegedly objectionable language since the date of the policy's issuance. *See* Syl. pt. 3, *Sizemore v. State Workmen's Comp. Comm'r,* 159 W.Va. 100, 219 S.E.2d 912 (1975) ("A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; *only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage* can it be considered to be retroactive in application." (emphasis added)). When such a request for retroactivity is made, we cautiously consider whether such retrospective application is indeed warranted.

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect,

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[25] *See supra* notes 2 & 4.

> since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

Syl. pt. 5, *Bradley v. Appalachian Power Co.,* 163 W.Va. 332, 256 S.E.2d 879 (1979). *Accord* Syl. pt. 4, *Kincaid v. Mangum,* 189 W.Va. 404, 432 S.E.2d 74 (1993); Syl. pt. 4, *King v. Kayak Mfg. Corp.,* 182 W.Va. 276, 387 S.E.2d 511 (1989). *See also Bowers v. Wurzburg,* 205 W.Va. 450, 468, 519 S.E.2d 148, 166 (1999) (declining to afford judicial decision broad retroactivity where, before its issuance, there existed "lack of clear authority in this State," which resulted in "uncertainty of the law" as to issue decided (footnote omitted)).

Applying these criteria to our holdings in *Mitchell v. Broadnax,* we conclude that our decision in *Mitchell* should not be applied retroactively to permit the prosecution of Ms. Findley's claim thereunder. In short, retroactivity is not warranted because our decision in *Mitchell* involved a matter of substantive law, namely W. Va.Code § 33-6-31(k), which had, prior to our decision therein,

received sparse treatment in our judicial decisions and had not been amended by the Legislature since its original enactment in 1979.[26] Given this dearth of interpretive authority, it goes without saying that the holdings we announced in *Mitchell* were "not clearly foreshadowed." Syl. pt. 5, in part, *Bradley,* 163 W.Va. 332, 256 S.E.2d 879. Furthermore, the substantial public policy issues implicated in our holdings, and explicitly identified by the Legislature in W. Va.Code § 33-6-30(b), mitigate in favor of a rule of prospectiveness. *See id.* Finally, as noted above, while we long have held exclusions in insurance policies to be valid,[27] we had not, prior to *Mitchell,* delineated the express requirements therefor contained in W. Va.Code § 33-6-31(k).

Thus, for the same reasons we declined to apply W. Va.Code §§ 33-6-30(b-c) retroactively in order to safeguard the substantive rights of insureds that had accrued before its passage, we likewise decline to apply our holdings in *Mitchell v. Broadnax* retroactively in order to shield insurers from the imposition of augmented substantive

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[26] To date, W. Va.Code § 33-6-31(k) has not yet been amended, although its provisions have been clarified as a result of the Legislature's enactment of W. Va.Code § 33-6-30(c). *See* W. Va.Code § 33-6-31(k) (1998) (Repl.Vol.2000); W. Va.Code § 33-6-30(c) (2002) (Supp.2002).

[27] *See* Syl. pt. 3, *Deel v. Sweeney,* 181 W.Va. 460, 383 S.E.2d 92 (1989) ("Insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes."). *Accord* Syl. pt. 4, *American States Ins. Co. v. Tanner,* 211 W.Va. 160, 563 S.E.2d 825 (2002); Syl. pt. 3, *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000); Syl. pt. 1, *Thomas v. Nationwide Mut. Ins. Co.,* 188 W.Va. 640, 425 S.E.2d 595 (1992).

liabilities that did not clearly exist prior to the announcement of such holdings. *See* Syl. pt. 2, *Smith,* 208 W.Va. 284, 540 S.E.2d 152. Having found *Mitchell* to have prospective only application, it is imperative to explain how this decision interplays with our previous conclusion that W. Va.Code § 33-6-30 also has only prospective application. Therefore, we hold as a matter of law, that the holdings of *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000), which allow insureds to pursue a cause of action against insurers to enforce the requirements of W. Va.Code § 33-6-31(k) (1995) (Repl.Vol.1996), apply only to those exclusions to insurance coverage incorporated into policies of motor vehicle insurance on or after the effective date of our decision therein, *i.e.,* February 18, 2000, and before the effective date of the Legislature's amendments to W. Va.Code § 33-6-30 (2002) (Supp.2002), *i.e.,* June 5, 2002. We make no determination, however, as to the success of such claims in light of the Commissioner's responsibility to evaluate the propriety of premiums as an essential and integral part of its function to approve insurance forms used in this State.[28] *See generally* W.

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[28] Based upon the very existence of the instant proceeding, and the Legislature's amendments to W. Va.Code § 33-6-30 following our decision in *Mitchell v. Broadnax,* we feel the need to further clarify the intended scope and effect of the holdings we previously announced therein. In spite of the plethora of recent lawsuits claiming to the contrary, we did not intend in *Mitchell* to declare that a *quid pro quo* premium adjustment is required to accompany every exclusion incorporated into a policy of motor vehicle insurance or even to suggest that such a corresponding premium necessary reflects a reduction thereof. Rather, the solitary goal that we wished to achieve through that decision was the elucidation and enforcement of the all but forgotten legislative directive contained in W. Va.Code § 33-6-31(k), which specifically instructs that "insurer[s are not prevented] from incorporating in such terms, conditions and exclusions *as may be consistent with*

(Continued on following page)

Va.Code § 33-6-9(e) (1957) (Repl.Vol.2000) (directing that "[t]he commissioner shall disapprove any such form of policy, application, rider, or endorsement or withdraw any previous approval thereof . . . [i]f the benefits provided therein are unreasonable in relation to the premium charged").

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the premium charged." (Emphasis added). In hindsight, however, it is evident that, although we ordinarily must presume that the Legislature means what it says in its enactments and that we must apply a statute's plain language without further interpretation of its terms, the construction we afforded to subsection *k* did not comport with the Legislature's understanding thereof. *See Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995) ("'[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.'") (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992)). *See also* Syl. pt. 4, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999) (""'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).' Syllabus point 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997)."). Above all, we wish to make abundantly clear that our most basic and preeminent concern in the *Mitchell* case, as in the case *sub judice*, is that insurance consumers and insurance purveyors alike receive the benefit of their bargained for exchange when they meet to contract for motor vehicle insurance coverage. *See generally* Syl. pt. 5, *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (recognizing simultaneous rights of insureds to pay premiums consistent with policy coverage and insurers to incorporate exclusionary language in policies of motor vehicle insurance).

Moreover, we reiterate our prior admonishment that it is the responsibility of this State's Insurance Commissioner to review such policy exclusions and to ensure that they are consistent with the premiums charged for such coverage. *See Mitchell v. Broadnax*, 208 W.Va. at 48-50, 537 S.E.2d at 894-96. We further applaud the Legislature's express recognition and explanation of the Commissioner's function in this regard. *See* W. Va.Code §§ 33-6-30(b-c).

Applying this rule to the facts of the case *sub judice,* we conclude that Ms. Findley does not have standing to assert a claim pursuant to *Mitchell v. Broadnax* because the exclusionary language of which she complains was neither incorporated into her policy of motor vehicle insurance nor modified so as to require a corresponding premium adjustment during the narrow temporal window described above. Absent an entitlement to the relief sought in accordance with *Mitchell,* Ms. Findley lacks standing to pursue her declaratory judgment action based thereon. *See Shobe v. Latimer,* 162 W.Va. at 784, 253 S.E.2d at 58. Accordingly, we affirm the circuit court's ruling insofar as it determined that Ms. Findley did not have standing to assert a claim pursuant to *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000).[29]

C. Anti-Stacking Provisions

Ms. Findley further asserts that the circuit court improperly determined that she was not entitled to stack coverages under her State Farm motor vehicle insurance policy. This argument is premised upon two types of anti-stacking provisions contained in the subject policy. First, the definition of an "underinsured motor vehicle" effectively precludes an insured, whose vehicle is insured under the policy's liability coverage, from also collecting UIM benefits with regard to the same vehicle involved in

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[29] Although we are affirming the circuit court's dismissal of Ms. Findley's *Mitchell v. Broadnax* claim, we wish to make clear that, because the circuit court did not certify this case as a class action, the dismissal of Ms. Findley's claim does not affect the rights of potential members of the class she purported to represent.

the same covered occurrence.[30] On this point, the circuit court found "as a matter of law that the subject vehicle is not an 'underinsured motor vehicle' under the applicable insurance policy, as the definition of underinsured motor vehicle clearly and unambiguously precludes UIM coverage for a vehicle insured under the same policy for liability purposes." (Citations omitted). The court continued that, "to declare this provision invalid would 'emasculate' this State's underinsured motorist statutory provision, and, in effect, would transform the underinsured coverage into liability coverage."

The second anti-stacking provision at issue herein precludes an insured from stacking the UIM coverages of vehicles owned by the same insured but covered under different State Farm policies and limits such recovery to an amount not to exceed the policy providing the highest level of liability coverage.[31] With respect to this exclusion, the circuit court determined that "State Farm is entitled to the granting of its . . . [m]otion for summary judgment on the issue of Laura Findley's stacking claim in light of the clear and unambiguous exclusion prohibiting stacking, for which John Findley received a multi-car discount." As to both such anti-stacking provisions, Ms. Findley urges this Court to find that they violate the requirements of W. Va.Code § 33-6-31(k) as that statute was interpreted in *Mitchell v. Broadnax,* while State Farm maintains that such exclusions are valid and enforceable.

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[30] *See supra* note 6 and accompanying text.

[31] *See supra* note 7 and accompanying text.

We noted above that Ms. Findley does not have standing to assert a claim pursuant to *Mitchell v. Broadnax* under the facts presently before this Court. Therefore, her argument that the anti-stacking provisions contained in her State Farm policy are not enforceable because they do not comply with the requirements of the holdings of *Mitchell* is without merit.

Nevertheless, were we to find Ms. Findley to be entitled to the relief she seeks under *Mitchell,* her claim is governed by our well-established precedent upholding both types of anti-stacking exclusions.

> There is no common law right to stack coverage available for multiple vehicles under the same policy or under two or more insurance policies. The right to stack must arise from the insurance contract itself (as that is the agreement of the parties) or from a statute (as in the uninsured and underinsured motorist coverage statutes).

Syl. pt. 1, *Payne v. Weston,* 195 W.Va. 502, 466 S.E.2d 161 (1995). Regarding policy language that prohibits the recovery of UIM benefits where liability coverage has already been collected, we have held that

> [w]hen an insurer issues an automobile insurance policy which provides both liability and underinsured motorists coverage, but which policy contains what is commonly referred to as a "family use exclusion" for the underinsured motorist coverage, and when, in a single car accident, the passenger/wife receives payments under the liability coverage for the negligence of the driver/husband, such exclusion is valid and not against the public policy of this state. That exclusion, which excludes from the definition of "underinsured motor vehicle" any automobile

> owned by or furnished for the regular use of the insured or a relative, has the purpose of preventing underinsured coverage from being converted into additional liability coverage.

Syl. pt. 2, *Thomas v. Nationwide Mut. Ins. Co.,* 188 W.Va. 640, 425 S.E.2d 595 (1992). *See also* Syl. pt. 3, *Payne v. Weston,* 195 W.Va. 502, 466 S.E.2d 161 ("An insured is not entitled to stack liability coverages for every vehicle covered by his or her policy when the insured received a multi-car discount, when only one vehicle was involved in the accident, and when the policy contains language limiting the insurer's liability."). This is so because "[w]here an insurance policy specifically excludes any motor vehicle owned by the policy holder from the definition of an 'underinsured motor vehicle,' then the underinsured motorist coverage was intended to protect the insured against losses caused by the negligence of another motorist who is underinsured." Syl. pt. 4, in part, *Alexander v. State Auto. Mut. Ins. Co.,* 187 W.Va. 72, 415 S.E.2d 618 (1992).

Likewise, we have found policy language precluding the stacking of UIM coverages for different vehicles to be valid and enforceable.

> West Virginia Code § 33-6-31 (1992) does not forbid the inclusion and application of an anti-stacking provision in an automobile insurance policy where a single insurance policy is issued by a single insurer and contains an underinsured endorsement even though the policy covers two or more vehicles. Under the terms of such a policy, the insured is not entitled to stack the coverages of the multiple vehicles and may only recover up to the policy limits set forth in the single policy endorsement.

Syl. pt. 5, *Russell v. State Auto. Mut. Ins. Co.,* 188 W.Va. 81, 422 S.E.2d 803 (1992). *See also* Syl. pt. 4, *Starr v. State Farm Fire & Cas. Co.,* 188 W.Va. 313, 423 S.E.2d 922 (1992) ("Under W. Va.Code, 33-6-31(c) (1988), one who is entitled to uninsured or underinsured motorist benefits solely by virtue of his or her occupancy or use of the policyholder's vehicle may not stack the policyholder's uninsured/underinsured motorist coverage on another vehicle not involved in the accident."). *Cf.* Syl. pt. 3, *State Auto. Mut. Ins. Co. v. Youler,* 183 W.Va. 556, 396 S.E.2d 737 (1990) ("So-called 'antistacking' language in automobile insurance policies is void under *W. Va.Code,* 33-6-31(b), as amended, to the extent that such language is purportedly applicable to uninsured or underinsured motorist coverage, and an insured covered simultaneously by two or more uninsured or underinsured motorist policy endorsements may recover under all of such endorsements up to the aggregated or stacked limits of the same, or up to the amount of the judgment obtained against the uninsured or underinsured motorist, whichever is less, as a result of one accident and injury.").

Based upon these prior decisions upholding anti-stacking policy provisions such as those at issue in the case *sub judice,* we affirm the circuit court's ruling upholding the anti-stacking provisions contained in Ms. Findley's State Farm policy.

D. Summary Judgment

Lastly, Ms. Findley claims that the circuit court erred by denying her cross-motion for summary judgment. At the conclusion of its August 1, 2002, order, the circuit court determined that Ms. Findley had not demonstrated

grounds for the relief she had requested. On appeal to this Court, Ms. Findley asserts that she is, in fact, entitled to judgment as a matter of law. State Farm, however, concurs in the circuit court's ruling which denied Ms. Findley relief.

Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). Stated otherwise,

> [a] motion for a summary judgment should be granted if the pleadings, exhibits and discovery depositions upon which the motion is submitted for decision disclose that the case involves no genuine issue as to any material fact and that the party who made the motion is entitled to a judgment as a matter of law.

Syl. pt. 5, *Wilkinson v. Searls,* 155 W.Va. 475, 184 S.E.2d 735 (1971). *Accord* Syl. pt. 4, *Benson v. Kutsch,* 181 W.Va. 1, 380 S.E.2d 36 (1989); Syl. pt. 1, *Floyd v. Equitable Life Assurance Soc'y,* 164 W.Va. 661, 264 S.E.2d 648 (1980) (per curiam). *See also* Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963) ("A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.").

Ordinarily, "[a]n order denying a motion for summary judgment is merely interlocutory, leaves the case pending for trial, and is not appealable except in special instances in which an interlocutory order is appealable." Syl. pt. 8, *Aetna,* 148 W.Va. 160, 133 S.E.2d 770. *See also* Syl., *Wilfong v. Wilfong,* 156 W.Va. 754, 197 S.E.2d 96 (1973)

("The entry of an order denying a motion for summary judgment made at the close of the pleadings and before trial is merely interlocutory and not then appealable to this Court."). Nevertheless, a party may "appeal . . . a denial of summary judgment after the conclusion of a trial and the entry of a final order." *Coleman v. Sopher,* 201 W.Va. 588, 594 n. 3, 499 S.E.2d 592, 598 n. 3 (1997). *Accord Wilfong,* 156 W.Va. at 759, 197 S.E.2d at 100. Likewise, where, as in the case *sub judice,* the order denying one party's motion for summary judgment simultaneously grants summary judgment to another party, such an order is final and appealable. In this regard, we have observed that "[a] motion for summary judgment which is granted . . . is an appealable final order." *Horace Mann Ins. Co. v. Leeber,* 180 W.Va. 375, 377 n. 5, 376 S.E.2d 581, 583 n. 5 (1988) (citation omitted). This is so because, "an order qualifies as a final order when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Durm v. Heck's, Inc.,* 184 W.Va. 562, 566, 401 S.E.2d 908, 912 (1991) (quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911, 921 (1945)) (additional citation omitted). Mindful of these principles, we now consider Ms. Findley's assignment of error.

Based upon the issues presented by the instant appeal, we concur with the circuit court's decision to deny Ms. Findley's cross-motion for summary judgment. As noted above, an integral precondition to such relief is a legal entitlement thereto. In this proceeding, however, Ms. Findley has not asserted grounds upon which she may legally recover. We have determined that she is not a proper party to assert a claim pursuant to *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000), and our

decision to apply W. Va.Code §§ 33-6-30(b-c) prospectively only likewise does not afford her relief. Moreover, we have concluded that the anti-stacking exclusions contained in the State Farm policy at issue herein are valid and enforceable. Thus, give [sic] our determination of the foregoing questions of law, we conclude that Ms. Findley has not demonstrated her entitlement "to a judgment as a matter of law" as required by Rule 56(c) of the West Virginia Rules of Civil Procedure. Accordingly, we affirm the circuit court's ruling denying Ms. Findley's cross-motion for summary judgment.[32]

IV.

CONCLUSION

In summary, we conclude that (1) the language of W. Va.Code §§ 33-6-30(b-c) (2002) (Supp.2002) does not apply retroactively; (2) Ms. Findley cannot assert a claim for relief pursuant to *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000); (3) the anti-stacking exclusions contained in the State Farm policy of motor vehicle insurance at issue herein are valid and enforceable; and (4) Ms. Findley is not entitled to summary judgment. Accordingly, the August 1, 2002, order of the Circuit Court of Barbour County is hereby affirmed.

Affirmed.

STARCHER, Justice, concurring.

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[32] In light of this decision, we need not further address or consider State Farm's cross-assignments of error. *See generally* Section III., *supra.*

(Filed Dec. 13, 2002)

I concur with the majority opinion, but I write separately to express my confusion over the firestorm that has been whipped into being about the true meaning of *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000).

Our Legislature, in its wisdom, followed in the footsteps of many other states in the 1960s and began to require insurance companies to provide uninsured and underinsured motorist insurance. The Legislature – not the insurance industry – defines what an uninsured motorist is and what an underinsured motorist is, and basically says this coverage protects policyholders wherever they are, so long as they are injured by an uninsured or underinsured motorist.

For example, in *Hamric v. Doe,* 201 W.Va. 615, 499 S.E.2d 619 (1997) we said a teenager injured when she dove out of the way of a swerving uninsured driver and into a ditch was protected by her parents' uninsured motorist coverage. She was not in, on, upon, or using a particular vehicle. She was simply walking down the road on her way to a football game – and under West Virginia law, her injuries caused directly by the uninsured driver were covered.

Mitchell v. Broadnax involved a little old lady who bought an uninsured motorist insurance policy – with $300,000.00 in coverage – on a car she probably never drove. She religiously paid her premiums for several decades. She was seriously injured on her way home from church when an uninsured drunk driver plowed head-on into a car in which she was a passenger. Ms. Mitchell sought uninsured motorist benefits from her insurance policy, but the insurance company refused to pay.

Buried in the insurance policy was an exclusion that said if Ms. Mitchell was hurt by an uninsured motorist while she was riding in a car that she owned, but did not insure under the insurance policy she paid for, then she had no coverage. When Ms. Mitchell was injured by the drunk driver, she was a passenger in a car she owned 50-50 with her daughter. Since her daughter bought insurance coverage for the car in which they were riding from another company, Ms. Mitchell's insurance company refused to pay her anything.

In other words, Ms. Mitchell paid premiums for $300,000.00 in insurance to protect her in case she was injured by an uninsured motorist. But because she helped her daughter buy a car, and then didn't encourage her daughter to buy insurance from the same insurance company as Ms. Mitchell, when she was injured by an uninsured motorist her insurance company refused to pay her the coverage for which she had paid her premiums. The circuit court upheld this decision by the insurance company.

All we said in *Mitchell v. Broadnax* was that under West Virginia law, if an insurance company wants to use an "owned-but-not-insured" exclusion to reduce its statutorily-required uninsured motorist coverage, like the one that surprised Ms. Mitchell, the insurance company has to prove that it appropriately adjusted its premiums to reflect a reduction in coverage for the exclusion. The insurance company couldn't just slip the exclusion in a policy without also showing it appropriately changed the premiums – both actions were required by West Virginia law. Otherwise, the exclusion would be invalid. We remanded the case back to circuit court to determine if the

insurance company ever told Ms. Mitchell it was changing her coverage and/or her premiums.

Somehow, *Mitchell v. Broadnax* has taken on epic proportions, with fears that every exclusion in every insurance policy ever issued in the market will be challenged, and the insurance industry panicking over the thought it might have to reveal to policyholders just how many exclusions they are packing into insurance policies without making any reductions to the premiums they are asking policyholders to pay. The facts in the instant case show why.

In the instant case, State Farm asked the Insurance Commissioner to approve the addition of at least sixteen different exclusions to its underinsured motorist insurance policy in November 1989. Yet even though coverage was substantially reduced, less than two years later, in May 1991, State Farm asked the Insurance Commissioner for permission to *increase* its premiums for underinsured motorist coverage by 92.7%. Another rate increase of 50% was sought in August 1993. Taken together, these increases resulted in an aggregate increase in rates of 188%, or a total of 288% of the base rate.[1] Then, in 1995, State Farm sought another rate increase in its underinsured

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[1] At the time, State Farm argued the rate increases were needed to offset this Court's opinion in *State Auto. Mut. Ins. Co. v. Youler,* 183 W.Va. 556, 396 S.E.2d 737 (1990), where we held that an exclusion prohibiting the stacking of separate automobile insurance policies was void as against public policy. However, the Legislature later authorized anti-stacking language, and when State Farm re-introduced an anti-stacking exclusion in its policy in 1995, it did not decrease its premiums.

motorist premiums, a rate increase that apparently offset State Farm's 10% multi-car discount to the penny.

The record establishes that State Farm consistently raised its premiums at the same time it lowered coverage, and never told its policyholders. Such actions would certainly be impermissible under *Mitchell v. Broadnax,* but it would be unfair to State Farm to retroactively impose that case's interpretation of *W.Va.Code,* 33-6-31(k).[2]

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[2] This is not to say that these exclusions cannot be found to be void for other reasons. As we stated in Syllabus Point 2 of *Shamblin v. Nationwide Mut. Ins. Co.,* 175 W.Va. 337, 332 S.E.2d 639 (1985):

> Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed.

In other words, an exclusion adopted prior to *Mitchell v. Broadnax* could still be found unenforceable if its wording is ambiguous, or the exclusion is contrary to statute, regulation or public policy.

Furthermore, while the Legislature enacted *W.Va.Code,* 33-6-30 [2002] as a "clarification of the existing law as previously enacted," the Legislature did nothing to clarify the confusing language used in *W.Va.Code,* 33-6-31(k), which states: Nothing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein, nor shall this section be construed as preventing any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged.

Justice McGraw discussed the problems with the language contained in *W.Va.Code,* 33-6-31(k) in his separate opinion in *Mitchell v. Broadnax,* and offered a plausible interpretation of the statute that courts could consider:

> The first clause of the subsection straightforwardly permits insurers to "offer[ ] benefits and limits other than those prescribed [in § 33-6-31]." This language obviously permits an automobile insurer to "offer" any type of coverage (together with particular policy limits) that it chooses. It is therefore

(Continued on following page)

I therefore respectfully concur.

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easily conceivable that an insurer could offer, in addition to the required offerings set forth in subsection (b) of the statute, other forms of coverage, including alternative uninsured or underinsured protection. What this language clearly does not sanction, however, is an automobile insurer failing in the first instance to present consumers with the prescribed optional coverages.

The more crucial question in interpreting subsection (k) is whether the second clause of the statute merely applies to the subject of the first clause to the "benefits and limits other than those prescribed herein" or whether it instead has freestanding significance such that insurers have broad authority to impose exclusions upon all motor vehicle coverages, even the "optional" uninsured and underinsured coverages required under subsection (b). The *Deel* [*v. Sweeney,* 181 W.Va. 460, 383 S.E.2d 92 (1989)] Court apparently chose the latter construction.

Deel misconstrued the second clause of subsection (k), an error that has been repeated in subsequent cases. This result is perhaps explained in no small part by the fact that the Deel Court misapprehended the relevant statutory language. The opinion, in fact, misquotes the second clause of subsection (k), by omitting the crucial word "in." *Deel,* 181 W.Va. at 463, 383 S.E.2d at 95.

Although not a model of textual clarity, the word "in" was plainly intended to be synonymous with "therein," which in effect limits the second clause to the subject of the first. Subsection (k) therefore merely permits an insurer to impose "terms, conditions and exclusions" upon "benefits and limits other than those prescribed herein." In other words, the statute allows an insurer to impose limitations or exclusions on offerings that are otherwise not specified in the statute. There is simply nothing in this language that could, by any stretch of the imagination, be construed to permit an insurance company to corrupt or curtail the coverages specifically prescribed in subsection (b), regardless of whether those coverages are mandatory or optional to the policyholder. 208 W.Va. at 61, 537 S.E.2d at 907 (McGraw, J., concurring, in part, and dissenting, in part).

McGRAW, Justice, concurring, in part, and dissenting, in part.

(Filed Jan. 6, 2003)

I concur with the majority's conclusion that the changes made to the statute should only be applied prospectively. However, I continue to disagree with the majority's interpretation of our insurance law with respect to uninsured motorist coverage, as I expressed in my separate opinion in *Mitchell v. Broadnax,* 208 W.Va. 36, 61, 537 S.E.2d 882, 907 (2000) (McGraw, J., concurring in part and dissenting in part). As my views from that case were ably expressed by Justice Starcher in his separate opinion in this case, I need not repeat them here.

However, I write separately because I feel that the majority is missing the central issue in this case – whether or not the premium paying citizens of this state are getting what they paid for from the insurance companies. People buy insurance with the hope that they will never need it. When they do need it, they expect that the coverage they bought will be available to them. If the insurance company wants to sell them a different product, one that might have more exceptions or limitations, that is its right to do so, but the price of the new product should reflect that reduced risk to the insurance company. To put it in the simplest of terms, if the insurance company is selling eggs by the dozen, the customer should find a dozen eggs in the carton, or should see a reduced price at the checkout counter.

In the same vein, I think the decision reached by the Court in *Broadnax* was not as earthshattering or complicated as some might think. In holding that an insurer who

puts an exclusion in a policy must "adjust the corresponding policy premium so that the exclusion is 'consistent with the premium charged,'" syl. pt. 5 (in part), *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000), the Court was simply acknowledging a fundamental aspect of our state's contract law. That is to say, our law has long held that you should get what you pay for, and if you haven't gotten what you paid for, you have a right to sue the other party for breach of contract.

Our state has a ten year statute of limitations for suits alleging a breach of contract. *See,* W. Va.Code 55-2-6 (1923); *McKenzie v. Cherry River Coal & Coke Co.,* 195 W.Va. 742, 466 S.E.2d 810 (1995) (*per curiam*). *Broadnax,* in my view, simply recognized that insurance companies have certain obligations under our already existing contract law. By placing a "starting date" of April 2000 (when *Broadnax* was issued) on any contract action against an insurance company that failed to reduce its premiums when it reduced coverage, I believe the majority opinion runs afoul of the basic contract law of this state. Thus I cannot agree with this aspect of the majority opinion.

Because of my ongoing concerns about the majority's interpretation of our law in this area, I respectfully concur in part and dissent in part to the majority opinion.

APPENDIX B

IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA

LAURA A. FINDLEY, individually and on behalf of all other persons similarly situated,

Plaintiff,

v. Civil Action No. 00-C-71

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

ORDER GRANTING THE DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AND DENYING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On the 12th day of April, 2002 and on the 24th day of May, 2002, came the Plaintiff, Laura Findley ("Findley" or "Laura Findley"), by her counsel, J. Michael Benninger, Paul T. Farrell, Jr. and James M. Pietz and came the Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), by its counsel Catherine D. Munster, James A. Varner, Sr. and Debra Tedeschi Herron, for hearing on State Farm's Motion for Summary Judgment, Second Motion for Summary Judgment and Motion to Strike the Affidavit of Daniel L. Selby and on Findley's Cross Motion for Summary Judgment. Whereupon, the court, after hearing argument of counsel and reviewing the memoranda of law submitted makes the following findings:

At a prior hearing, the Court placed on the record that the Court was a policy holder with State Farm and inquired of counsel if there was an objection to the Court continuing to preside in this matter. Counsel for each of the parties waived any objection to the Court continuing to preside.

Procedural History

1. On or about November 17, 2000, the subject civil action was commenced in the Circuit Court of Barbour County, West Virginia by Laura Findley against State Farm.

2. On or about November 22, 2000, the plaintiff filed an Amended Declaratory Complaint in this matter seeking underinsured motorist ("UIM") coverage under the Findley insurance policy and alleging that exclusionary language contained within the State Farm policy relating to underinsured motor vehicles was contrary to public policy and requesting that the Court declare that the plaintiff is entitled to UIM benefits, as well as attorney's fees and costs.

3. On or about May 8, 2001, Laura Findley filed a motion to Amend her Complaint, attaching Findley's First Amended Class Action Complaint. In addition to naming Susan Morris, an employee of State Farm, as a defendant, the First Amended Class Action Complaint included class action allegations, as well as claims of alleged violation of the Consumer Protection Act, alleged violations of the Unfair Trade Practices Act, and alleged mutual mistake of fact and unilateral mistake of fact, seeking both UIM benefits and a return of her premiums, as well as attorney's fees and costs.

4. By Order entered July 10, 2001, the court granted the plaintiff's motion for leave to amend the complaint.

5. On July 25, 2001, the plaintiff filed her First Amended Class Action Complaint with the Circuit Clerk of Barbour County. State Farm timely filed an Answer to the First Amended Class Action Complaint and the parties, as directed by the court, agreed upon the terms contained within the First Scheduling Order. Pursuant to the terms of the First Scheduling Order, all discovery proceedings relating to Counts II and III are stayed until further order of the court. Discovery was conducted, but not completed, as to the issues raised in Count I pertaining to the decision of the West Virginia supreme court in *Mitchell v. Broadnax,* 208 W. Va. 36, 537 S.E.2d 882 (2000). By subsequent agreement of the parties, discovery was concluded pertinent to the *Broadnax* issues.

6. On or about the 14th day of February, 2002, State Farm filed its first Motion for Summary Judgment alleging that Findley is not entitled to recover underinsured motor vehicle benefits under the applicable insurance policy as the vehicle she was riding in was insured for liability purposes under the State Farm insurance policy and the definition of underinsured motor vehicle under the terms of the insurance policy preclude coverage for a vehicle insured under the liability policy (referred to by the plaintiff as the "intra-policy setoff" provision); that Findley's *Mitchell v. Broadnax* arguments fail as to the definition of underinsured motor vehicle, as the definition of underinsured motor vehicle has been consistently and unequivocally upheld by the West Virginia Supreme Court of Appeals and adopting the plaintiff's *Mitchell v. Broadnax* arguments would defeat the legislative intent of underinsured motorist coverage which would, as a matter

of controlling West Virginia law, emasculate the underinsured motorist statutory provisions; that Findley is not a named insured and therefore is not entitled to stack underinsured motorist coverages available under John Findley's other multiple insurance policies; that Findley is a "Class Two" insured by mandatory statutory definition and is specifically prohibited from receiving or stacking underinsured motorist benefits from said policies under controlling West Virginia law; that Findley's *Mitchell v. Broadnax* arguments fail as to stacking the multiple policies of John Findley because the West Virginia Supreme Court of Appeals has concluded that the multi-car discount is an appropriate adjustment for the anti-stacking language; and, that because all of Findley's claims and causes of action arise out of and are dependent upon her impermissible claim for underinsured motorist coverage benefits, all counts of the First Amended Class Action Complaint should be dismissed.

7. On or about April 10, 2002, Findley filed her Cross motion for Summary Judgment and a Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment alleging that there is no evidence that the anti-stacking or other purported exclusions are legally effective pursuant to *Mitchell v. Broadnax*. In support of her Cross Motion for Summary judgment, Findley alleged that State Farm cannot establish the legal effectiveness of its UIM exclusions as no evidence exists that State farm reduced UIM premiums as the *quid pro quo* for incorporation of the intra-policy setoff provision and no evidence exists that State Farm reduced UIM premiums as the *quid pro quo* for incorporation of an anti-stacking exclusion.

8. A hearing was conducted on these issues on April 12, 2002, at which time, the Court heard argument of counsel and established deadlines for the submission of additional memoranda by the parties in support of their respective positions.

9. On or about May 16, 2002, pursuant to the Court's request, State Farm filed its Supplemental Memorandum of Law in Support of its Motion for Summary Judgment relating solely to the issue of a Class Two insured's standing to assert an underinsured motorists stacking claim as determined by virtue of marital separation from a Class One insured.

10. On or about May 16, 2002, State Farm filed its Second Motion for Summary Judgment and Memorandum of Law in Support thereof, relative to *Broadnax* issues alleging that Findley's claims are barred by the provisions of H.B. 4670, now West Virginia Code § 33-6-30(b) and (c), which clarifies the law relative to the provisions of § 33-6-31(k) of the West Virginia Code and the West Virginia supreme court's holding in *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (2000) addressing the requirement of "appropriately adjusted" premiums; that West Virginia Code § 33-6-30(b) and (c) enunciate that there is no *quid pro quo* premium adjustment requirement relative to terms, conditions or exclusions contained within an insurance policy and that forms used and rates charged by insurance carriers that have received approval from the West Virginia Insurance Commissioner's Office are presumed to be in full compliance with the West Virginia Code; that the subject forms used and rates charged relating to the policy terms at issue herein were approved by the Insurance Commissioner's Office and demonstrate that premiums are "appropriately adjusted"; that Findley's

Mitchell v. Broadnax claims are barred by the "Filed Rate Doctrine", as the West Virginia Insurance Commissioner's Office is the regulatory agency charged with the exclusive authority to regulate rates charged and forms used by insurance companies and as the rates charged by State Farm received approval from the regulatory agency, the rates are per se reasonable and not subject to collateral attack by way of judicial proceedings; that Findley's *Mitchell v. Broadnax* argument fails in that all of State Farm's rate filings and form filings relative to the coverage afforded and rates charged in the instant matter received approval from the West Virginia Insurance Commissioner's Office prior to their use and as the same are in compliance with the law, the rates charged and forms used are valid and enforceable; that to deregulate the insurance industry by allowing retroactive private collateral challenges would be to the severe detriment of insureds, creating "Russian Roulette" coverage and defeating the reasonable expectations of coverage; that Findley's *Mitchell v. Broadnax* arguments fail because to require State Farm to validate its previously approved rates and forms is a usurpation of the power of the Insurance Commissioner's Office and is a violation of the Separation of Powers Clause of the West Virginia Constitution; that Findley failed to exhaust her administrative remedies mandated by the West Virginia Code prior to instituting suit in this matter and for the plaintiff to be permitted to proceed in this forum, without having exhausted her administrative remedies, is a violation of West Virginia law; that permitting Findley to proceed with her *Mitchell v. Broadnax* claims would constitute a violation of State Farm's constitutional due process rights by denying State Farm the fundamental fairness required by the due process clause of the 14th Amendment to the United

States Constitution; and, that as all of Findley's *Mitchell v. Broadnax* claims and causes of action are barred by both constitutional and West Virginia law, State Farm is entitled to summary judgment.

11. On or about the 22nd day of May, 2002, Findley filed her Reply Memorandum in Support of the Cross Motion for Summary Judgment and in Opposition to Defendant's Motions for Summary Judgment alleging that State Farm has never complied with the contractual obligations conditional to UIM exclusions or limitations which are required by West Virginia Code § 33-6-31(k); that West Virginia Code § 33-6-30 does not bar the plaintiff's claims in this matter as West Virginia Code § 33-6-30 did not alter or change the *Broadnax* construction of West Virginia Code § 33-6-31(k), which remains in force, and that the separation of powers precludes West Virginia Code § 33-6-30 from providing a rule of decision in this case; that West Virginia Code § 33-6-30(b) and (c) is prospective only and cannot be applied retroactively to destroy policyholders' contractual property rights as the plaintiff's causes of action are constitutionally protected; that the Commissioner's approval of insurance forms and rates does not preclude plaintiff's claims; that the "filed rate" doctrine does not apply; that the exhaustion defense does not apply; and that collateral estoppel does not apply.

12. On or about the 23rd day of May, 2002, State Farm filed its Motion to Strike the Affidavit of Daniel L. Selby from the record in this matter alleging that Daniel L. Selby ("Selby") had not been identified by the plaintiff; that State Farm had not been given the opportunity to depose Selby; and, that State Farm would suffer prejudice if the affidavit of Selby remained as part of the record.

13. A hearing was conducted on these issues on may 24, 2002, at which time, the Court heard argument of counsel and established deadlines for the submission of a reply memorandum by State Farm and proposed orders from the parties, including a procedural history and findings of fact and conclusions of law. The Court took under advisement State Farm's Motion to Exclude the Affidavit of Daniel L. Selby.

14. On June 20, 2002, as permitted by the Court, State Farm timely served its Reply Brief in Support of its Second Motion for Summary Judgment alleging that West Virginia Code § 33-6-30(b) and (c) applies and is controlling in this matter; that West Virginia Code § 33-6-30(b) and (c) is a clarification of existing of [sic] law and should be applied; that retroactive application of West Virginia Code § 33-6-30(b) and (c) does not constitute an impairment of contract under the Contracts Clause or existing case law; that the "filed rate" doctrine does apply and West Virginia Code § 33-6-17 does not apply; that the application of the "filed rate" doctrine does not deprive Findley of the "Certain Remedy Provision" of the West Virginia Constitution; and that Findley's claims violate State Farm's due process rights.

FINDINGS OF FACT

The Court finds as undisputed the following material facts:

1. On or about March 18, 2000, the plaintiff, Laura Findley, was riding as a passenger in a Chevrolet Cavalier, insured by her estranged husband John Findley, when she was injured in a single vehicle accident. The driver of the Chevrolet Cavalier, Rusty Hyde, did not

independently own a vehicle and had no automobile insurance.

2. The Chevrolet Cavalier was in the lawful possession of Laura Findley, pursuant to an Order entered November 17, 1999 by the Barbour County Family Law Master Beth Longo, wherein Laura Findley was awarded exclusive use and possession of the Chevrolet Cavalier.

3. The Chevrolet Cavalier was insured by State farm, under State Farm Policy No. 232-7297-D24-48D, originally issued to John Findley on September 26, 1991. Laura Findley was not a named insured and, at the time of the accident, was not a resident of John Findley's household. Whether it was her intent to permanently remain separate and apart from John Findley at the time of the accident is in dispute.

4. John Findley's policy included per person liability limits of $50,000.00 and underinsured motorist coverage with limits of $50,000.00. In addition to the policy of insurance applicable to the Chevrolet Cavalier, John Findley was in possession of two other policies of insurance with State Farm; Policy No. 8580-C24-48 originally obtained on June 29, 1998 insuring a 1985 Chevrolet S10 Blazer; the other, Policy No. 257-9255-A30-48B originally obtained on January 30, 1996 insuring a 1999 Ford E250 Van.

5. Subsequent to the accident, Laura Findley filed a claim with State Farm under Policy No. 232-7297-D24-48D for injuries and damages she sustained as a result of the March 18, 2000 accident. State Farm tendered the liability policy limits for bodily injury coverage to Laura Findley. Laura Findley accepted the liability policy limits of $50,000.00 and executed a full and complete release of

the tortfeasor, Rusty Hyde. Asserting that her damages exceeded the bodily injury liability coverage limit, Laura Findley then filed claims with State Farm for underinsured motorist coverage under each of John Findley's insurance policies with State Farm.

6. The policy language of John Findley's policy pertaining to Coverage W – Underinsured Motorist Coverage, provides in pertinent part,

> [w]e will pay for damages for **bodily injury** and **property damage** an **insured** is legally entitled to collect from the owner or driver of an **underinsured motor vehicle**. The **bodily injury** or **property damage** must be caused by accident arising out of the operation, maintenance, or use of an **underinsured motor vehicle**.

7. Within the same provision, the policy defines "underinsured motor vehicle" and provides an additional definition as to what is specifically not included within the term "underinsured motor vehicle".

> An **underinsured motor vehicle** does not include a land motor vehicle:
>
> 1. insured under the liability coverage of this policy; . . ."

8. John Findley received a multi-car discount for insuring multiple vehicles with State Farm. With respect to the stacking of multiple vehicle UIM coverages, the policies contain the following anti-stacking provision: "If other underinsured motor vehicle coverage issued by us to you, your spouse, or any relative applies, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability."

9. All forms used by State Farm relative to the coverage herein and all rates charged by State Farm upon the coverage herein received approval from the West Virginia insurance Commissioner's Office prior to their use.

10. In November 1989, State Farm submitted Endorsement 6069AG, which amended the definition of Underinsured Motor Vehicle. Endorsement 6069 AG received approval from the West Virginia Insurance Commissioner's Office in December, 1989 and became effective for use as of January 1, 1990. Amendatory Endorsement 6069AG modified the definition of UIM coverage and incorporated various exclusions limiting the scope of UIM coverage afforded to the insured including, but not limited to, the following exclusions:

–UIM coverage inapplicable to vehicles insured under the liability coverage (i.e. intra-policy set-off)

–UIM coverage inapplicable to vehicles furnished for regular use

–UIM coverage inapplicable to vehicles defined as an UM vehicle

–UIM coverage inapplicable to vehicles owned by United States

–UIM coverage inapplicable to vehicles owned by State of West Virginia

–UIM coverage inapplicable to vehicles operated on rails

–UIM coverage inapplicable to vehicles designed for use off public roads

–UIM coverage inapplicable to vehicles while located for use as premises

–Owned but not insured (i.e. OBNI)

–UIM coverage inapplicable insured is struck by another vehicle owned by insured

–Anti-stacking when injured as a pedestrian

–Anti-stacking while injured in a vehicle owned by you

–Anti-stacking while injured in a vehicle not owned by you

–UIM applies only to the extent it exceeds primary coverage

–Newly acquired car

–Amended renewal condition

11. No evidence has been propounded demonstrating that State Farm adjusted premiums from inclusion of these amendatory endorsements in 1989, although State Farm contends the overall premium was consistent with the policy provisions.

12. On August 2, 1993, State Farm submitted a Rate Filing to the West Virginia Insurance Commissioner's Office. State Farm received approval from the West Virginia Insurance Commissioner's Office in November, 1993 with an increase of 63.5% for UIM. The rates approved within this Rate Filing became effective February 1, 1994.

13. On August 2, 1995, State Farm submitted a RATE FILING to the West Virginia Insurance Commissioner (Exhibit 11 to Mooney Deposition) which references Senate Bill 309 and incorporates an "offset" a proposed 10% multi-car discount with a UIM basic rate increase (see page 5 of 7 Exhibit 11 to Mooney Deposition). The

1995 RATE FILING quotes the 1992 UIM "Projected Voluntary Underwriting Experience" as $25,437,273.00 (Exhibit 11 to Mooney Deposition at referencing "Exhibit XVII").

14. On August 16, 1995 State Farm submitted a FORM FILING to the West Virginia Insurance Commissioner incorporating anti-stacking language through amendatory endorsement 6090AQ (Exhibit 12 to Mooney Deposition). As a result, UIM coverage no longer was subject to "stacking."

15. State Farm requested a 92.7% UIM rate level increase in 1991 and a 50% UIM rate level increase in 1993 premised upon the removal of anti-stacking language from its policy and did not decrease UIM premiums in 1995 when anti-stacking language was re-incorporated into the automobile insurance policy in Amendatory Endorsement 6090AQ, but alleges the premium charged was consistent with the policy provisions.

16. No UIM premium rate adjustment was submitted by State Farm in 1996.

17. On July 3, 1997, State Farm submitted a RATE FILING to the West Virginia Insurance Commissioner incorporating a UIM rate level decrease of -1.7% (Exhibit 16 to Mooney Deposition) based upon a favorable experience due to the incorporation of anti-stacking language into the State Farm automobile insurance policy.

18. On October 15, 1998, State Farm submitted a RATE FILING to the West Virginia Insurance Commissioner incorporating a UIM rate level decrease of -8.6%

19. On July 19, 2000, State Farm submitted a RATE FILING to the West Virginia Insurance Commissioner

incorporating a UIM rate level increase of +2.4%, which was approved and became effective in November 2000.

20. It is the position of the Insurance Commissioner's Office that:

a. It is the exclusive duty and responsibility of the Insurance Commissioner's Office to insure that the benefits of insurance policies are reasonable in relation to the premium charged. "Exclusions are consistent with the premiums charged when the Rates and Forms Division of the Insurance Commissioner's Office approves them." *Affidavit of Mia Rowe, paragraph 13. In accord, Vincent King Dep. II at pages 33, 52-53.*

b. In determining the appropriate premium adjustment for purposes of West Virginia Code § 33-6-31(k), numerous factors must be considered. Thus, the addition of an exclusion may quite properly *not* result in a premium reduction because the effect of the exclusion is offset by the increases produced by the other factors. *Vincent King Dep. II at pages 54-56.*

21. State Farm was first presented with Daniel Selby's Affidavit two days before the May 24, 2002 hearing, as the same was contained within the plaintiff's exhibits in support of her cross-motion for summary judgment. A review of the plaintiff's cross-motion and memorandum in support thereof demonstrates that the plaintiff did not rely on the Selby affidavit and, therefore, will suffer no prejudice from having the affidavit not considered for purposes of these motions, but allowed to remain in the record.

CONCLUSIONS OF LAW

1. In West Virginia, a motion for summary judgment should only be granted when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994). With respect to State Farm's motions for summary judgment, there are no genuine issues of material fact.

2. State Farm is entitled to the granting of its First Motion for Summary Judgment (filed February 14, 2002), on the application of the "intra-policy setoff" provision, for the following reasons:

a. The Court finds as a matter of law that the subject vehicle is not an "underinsured motor vehicle" under the applicable insurance policy, as the definition of underinsured motor vehicle clearly and unambiguously precludes UIM coverage for a vehicle insured under the same policy for liability purposes. *See Thomas v. Nationwide Mutual Insurance Company,* 188 W.Va. 640, 425 S.E.2d 592 (1992); *Alexander v. State Farm Mutual Insurance Company,* 187 W.Va. 72, 415 S.E.2d 618 (1992).

b. The definition of "underinsured motor vehicle" as contained within the applicable State Farm policy originally issued September 26, 1991 is consistent with the statutory requirements of the West Virginia Code and is in accord with public policy.

c. Moreover, as found by our state supreme court, to declare this provision invalid would "emasculate" this State's underinsured motorist statutory provisions, and, in effect, would transform the underinsured coverage into

liability coverage. This finding is controlled by the West Virginia Supreme Court of Appeals rulings in *Thomas v. Nationwide Mutual Insurance Company,* 188 W.Va. 640, 425 S.E.2d 595 (1992); and *Alexander v. State Automobile Mutual Insurance Company,* 187 W.Va. 72, 415 S.E.2d 618 (1992).

d. The plaintiff's *Broadnax* arguments cannot be applied to this provision of the subject policy. The policy in question was issued September 26, 1991. Endorsement 6069AG received approval in December 1989 and became effective January 1, 1990, prior to issuance of the subject policy. If a challenge to the endorsement could be brought, the Court is of the opinion it could only be done by persons owning policies on January 1, 1990, alleging benefits were deleted from their policies without corresponding adjustments to premiums.

3. State Farm is entitled to the granting of its First Motion for summary judgment on the issue of Laura Findley's stacking claim in light of the clear and unambiguous exclusion prohibiting stacking, for which John Findley received a multi-car discount.

The issue of whether Laura Findley has standing to asset a "Broadnax" claim is factually in dispute. However, the Court finds the "Broadnax" claim not applicable as hereinafter set forth.

4. State Farm is also entitled to summary judgment as a matter of law for the reasons set forth in its Second Motion for Summary Judgment as the Plaintiff's cause of action is barred by the provisions of West Virginia Code § 33-6-30(b) and (c) for the following reasons:

a. West Virginia Code § 33-6-30(b) and (c) is a clarification of existing law and does not overrule *Mitchell v. Broadnax*.

b. As clarified by West Virginia Code § 33-6-30(b) and (c), nothing in *Broadnax* or West Virginia Code § 33-6-31(k) requires a *quid pro quo* premium adjustment for the incorporation of policy terms and exclusions.

c. *Broadnax* does not require an overall premium reduction if it is shown that the policy, with the exclusions, has an appropriate premium for the coverage provided.

d. As State Farm's policy language and premium rates were approved by the West Virginia Insurance Commissioner's Office prior to use. State Farm has met its statutory burden of demonstrating that the coverage afforded, including definitions and exclusions, were "consistent with the premium charged."

e. The language contained within West Virginia Code § 33-6-30(b) and (c) expresses the Legislature's intention for the same to apply to existing cases.

f. As a clarification of existing law, West Virginia Code § 33-6-30(b) and (c) is to be retroactively applied. *See Hutchens v. Progressive Paloverde Insurance Company, et al.*, Civil Action No. 5: 02-0304 (United States District Court-Southern District of West Virginia, entered July 23, 2002.)

g. The "Savings Clause" of the Insurance Code, West Virginia Code § 33-4-6, does not apply in this matter, as West Virginia Code § 33-6-30 is not a repeal of an existing statute.

h. Under the separation of powers doctrine, this Court is to presume the acts of the Legislature to be constitutional and is required to liberally construe and apply the legislation so as to achieve its objectives in any reasonable way which will sustain its constitutionality. *Franz v. Palmer,* Slip Op. No. 29178 (W. Va., decided Oct. 29, 2001).

i. Retroactive application of West Virginia Code § 33-6-30(b) and (c) does not impermissibly infringe upon the constitutional Contracts Clause because, under the *Shell* test, the legislative enactment applies to the regulated subject of a heavily regulated industry; there is a significant and legitimate public purpose behind the legislation; and, the legislation is reasonable in character. *See Shell v. Metropolitan Life Ins. Co.,* 181 W.Va. 16, 380 S.E.2d 183 (1989).

5. The plaintiff's cross-motion for summary judgment should be denied for all of the reasons set forth above.

6. The Court finds the "Filed Rate Doctrine," the failure to exhaust administrative remedies defense and the deprivation of constitutional due process rights defense as propounded by the Defendant are not applicable.

WHEREFORE, based upon the above, it is hereby **ORDERED** that State Farm's Motions for Summary Judgment be, and the same are hereby, **GRANTED**. Furthermore, for the above-stated reasons, it is hereby **ORDERED** that the Plaintiff's Cross Motion for Summary Judgment is hereby **DENIED**. State Farm's Motion to Exclude the Affidavit of Daniel Selby, previously taken under advisement by the Court, is hereby **GRANTED** to the extent that the Affidavit of Daniel L. Selby is not

considered for purposes of these motions but may remain a part of the record.

Nothing further appearing to be done in this action, it is hereby **ORDERED** that this action be removed from the docket of this Court and retired among actions ended.

Any and all objections and exceptions to the Court's ruling are hereby preserved.

The Clerk of this Court is directed to provide copies of this Order to Counsel of Record.

Enter this the 1st day of August, 2002.

/s/ Alan D. Moats
ALAN D. MOATS, JUDGE

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 16th day of January 2003, the following order was made and entered:

Laura A. Findley, individually and
on behalf of all other persons similarly
situated, Plaintiff Below, Appellant

vs.) No. 30842

State Farm Mutual Automobile Insurance
Company, Defendant Below, Appellee,

Nationwide Mutual Insurance Company,
Intervenor

The Court, having maturely considered the petition for rehearing filed by the appellant, Laura Findley, by Wilson, Frame, Benninger & Metheney, and J. Michael Benninger and Paul T. Farrell and Malakoff, Doyle & Finberg, and James M. Pietz, her attorneys, is of the opinion to and doth hereby refuse said petition for rehearing. Justice McGraw would grant.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 23rd day of January 2003, the following order was made and entered:

Laura A. Findley, individually and
on behalf of all other persons similarly
situated, Plaintiff Below, Appellant

vs.) No. 30842

State Farm Mutual Automobile Insurance
Company, Defendant Below, Appellee,

Nationwide Mutual Insurance Company,
Intervenor

The Court, having maturely considered the record and the oral argument and the briefs of counsel thereon, is of the opinion for reasons stated in writing and filed with the record that there is no error in the ruling of the Circuit Court of Barbour County, rendered on the 1st day of August, 2002. It is therefore considered and ordered by the court that said ruling be, and it hereby is, affirmed; and that the appellee, State Farm Mutual Automobile Insurance Company, do recover from the appellant, Laura A. Findley, their costs in their behalf expended, said costs not to include attorneys' fees or costs, all of which is ordered to be certified to the Circuit Court of Barbour County.

The syllabus of points adjudicated, prefixed to the written opinion aforesaid prepared by Chief Justice Davis, was concurred in by Justices Maynard and Albright. Justice Starcher concurs and reserves the right to file a concurring opinion. Justice McGraw, concurs in part, and

dissents in part, and reserves the right to file a separate opinion.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX E

ENROLLED

H. B. 4670

(By Delegates Beane, Staton, Michael, Amores, Trump and G. White)

[Passed March 7, 2002; in effect ninety days from passage.]

AN ACT to amend and reenact section thirty, article six, chapter

thirty-three of the code of West Virginia one thousand nine hundred thirty-one, as amended, relating to construction of insurance policies; setting forth legislative findings and clarifying that specific line item premium discounts are not required.

Be it enacted by the Legislature of West Virginia:

That section thirty, article six, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 6. THE INSURANCE POLICY.

§33-6-30. Construction of policies.

(a) Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended or modified by any rider, endorsement or application attached to and made a part of the policy: *Provided*, That the word "physician" when used in any accident and sickness policy or other contract providing for the payment of surgical procedures shall be construed to include a physician, dentist or chiropodist-podiatrist performing surgical

procedures or chiropractor performing other health care services within the scope of his or her professional license: *Provided, however*, That any policy of insurance or medical or health service contract providing for payment or reimbursement for any professional services pertaining to eye examination, refractions or the fitting of corrective lenses shall be construed to include payment or reimbursement for professional services rendered by either a duly licensed physician or a duly licensed optometrist, within the scope of their respective professional licenses, and that the insured or subscriber have freedom of choice to select either a physician or an optometrist to render or perform professional services.

(b) The Legislature finds:

(1) That consumers and insurers both benefit from the legislative mandate that the insurance commissioner approve the forms used and the rates charged by insurance companies in this state;

(2) That certain classes of persons are seeking refunds of insurance premiums and seeking to void exclusions and other policy provisions on the basis that insurance companies allegedly failed to provide or demonstrate a reduction in premiums charged in relation to certain terms or exclusions incorporated into policies of insurance;

(3) That historically, as a prerequisite to a rate or form being approved, neither the Legislature nor the insurance commissioner has ever required that the insurer demonstrate that there was a specific premium reduction for certain exclusions incorporated into policies of insurance;

(4) That the provisions of this chapter were enacted with the intent of requiring the filing of all rates and forms with the insurance commissioner to enable the insurance commissioner to review and regulate rates and forms in a fair and consistent manner;

(5) That the provisions of this chapter do not provide and were not intended to provide the basis for monetary damages in the form of premium refunds or partial premium refunds when the form used and the rates charged by the insurance company have been approved by the insurance commissioner;

(6) That actions seeking premium refunds or partial premium refunds have a severe and negative impact upon insurers operating in this state by imposing unexpected liabilities when insurers have relied upon the insurance commissioner's approval of the forms used and the rates charged insureds; and

(7) That it is in the best interest of the citizens of this state to ensure a stable insurance market.

(c) Nothing in this chapter may be construed as requiring specific line item premium discounts or rate adjustments corresponding to any exclusion, condition, definition, term or limitation in any policy of insurance, including policies incorporating statutorily mandated benefits or optional benefits which as a matter of law must be offered. Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter. It is the intent of the Legislature that the amendments in this section enacted during

the regular session of two thousand two are: (1) A clarification of existing law as previously enacted by the Legislature, including, but not limited to, the provisions of subsection (k), section thirty-one of this article; and, (2) specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of Mitchell v. Broadnax, 537 S.E.2d 882 (W.Va. 2000). These amendments are a clarification of the existing law as previously enacted by this Legislature.

APPENDIX F

No. 30842
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

LAURA A. FINDLEY, individually

and on behalf of all other persons similarly situated,

Appellant/Plaintiff below,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellee/Defendant below,

FROM THE CIRCUIT COURT OF
BARBOUR COUNTY, WEST VIRGINIA

APPELLANTS' PETITION FOR REHEARING

J. Michael Benninger, Esquire
Paul T. Farrell, Jr., Esquire
Wilson, Frame, Benninger & Metheney, P.L.L.C.
151 Walnut Street
Morgantown, WV 26505
Phone: (304) 292-9429

James M. Pietz, Esquire
Malakoff Doyle & Finberg, P.C.
Suite 200, The Frick Building
Pittsburgh, PA 15219
Phone: (412) 281-8400

Counsel for Appellant/Plantiff Below

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W.Va. Code § 33-6-60(k)

Petitioner-Appellant Laura Findley, on behalf of herself and all others similarly situated ("Policyholders"), files this Petition For Rehearing pursuant to Rule 24 of the West Virginia Rules of Appellate Procedure.

Introduction

Rehearing is warranted because the majority opinion is based [sic] a misapprehension of federal constitutional law. Respectfully, the prospective application of this Court's decision in *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000), is constitutionally infirm for the following reasons.

1. The majority opinion misapprehends that the Due Process Clause of the United States Constitution, as construed by the United States Supreme Court in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) and *James Beam v. Georgia*, 501 U.S. 529 (1991), which *prohibits* this Court from determining that this Court's decision in *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000) applies prospectively. *Harper* and *James Beam* provide that when a court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or *res judicata*. 501 U.S. at 529. This Court in *Broadnax* applied its decision retroactively and cannot now reverse course. It

is respectfully submitted that this Court is constrained to follow the prohibition of "selective prospectivity" established in *Harper* and *James Beam*, since it is based upon federal constitutional standards.

2. The majority opinion misapprehends that the "retroactive effect" of a court decision constitutes an equitable remedy, not a "choice of law" question. *Harper* and *James Beam* hold that litigants cannot be distinguished for choice of law purposes on the particular equities of their claims to prospectivity. 501 U.S. at 543. Instead, the "balancing of equities" is properly a remedial inquiry, not a choice of law approach. *Id.* at 544. The majority opinion, however, treated the effect of applying *Broadnax* retroactively as a "choice of law" question. In this connection, the majority determined that if *Broadnax* were to be applied retroactively, the "balance of equities" would favor State Farm, and therefore, the appropriate choice of law would be to give prospective effect. Maj.Op. at 27-28. *In doing so, the majority opinion completely deprives Policyholders of any and all remedies for injuries suffered by reason of State Farm's recognized violations of the law.* Therefore, the majority opinion is contrary to federal constitutional standards which would require this court to consider (or remand to the circuit court to consider) the availability of equitable remedies that apply to protect *both* parties from any unfairness that would result from retroactive application. Crucially, the prior retroactivity doctrine first established in *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), in West Virginia which allows a "balancing of equities" is applicable in fashioning a remedy, not for choosing prospectivity, in the limited instance where, as here, "selectively prospective" application is at issue.

3. The majority opinion misapprehends that the question of decisional retroactivity was not even presented because at issue in *Broadnax* was the judicial construction of a statute. A judicial construction of a statute is merely a declaration of what the law has always been as embodied in the legislative enactment. See, *Rivers v. Roadway Express*, 511 U.S. 298, 313 (1994). Stated differently, it is not for the court to legislate the effective date of a statute. The failure to apply the law as it existed before the majority opinion was rendered violates Policyholders' rights to Due Process of Law. *Fiore v. White*, 531 U.S. 225, 228 (2001).

4. Rehearing is particularly appropriate in this instance because the majority opinion, *sua sponte*, decided to give the *Broadnax* decision prospective effect even though the issue was neither raised nor briefed herein or in the lower court by the parties. Moreover, since this Court's decision in *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), there has been a "sea change" in the constitutional framework for applying a judicial decision prospectively. The parties naturally assumed that *Broadnax* could only apply retroactively given that this Court applied its decision retroactively in that case. The question of whether this court can and should apply *Broadnax* prospectively to remaining litigants, apart from the parties themselves in *Broadnax*, is a question of substantial public importance that raises critical questions of federal constitutional law. The parties should be given a full opportunity to brief these important questions. It is therefore requested that this Honorable Court grant the Petition for Rehearing to assure proper resolution of these important constitutional and remedial issues.

A. Selectively Prospective Application Of Judicial Decisions Is Prohibited By The Due Process Clause Of The United States Constitution

The evolution of the current federal constitutional restraints on the prospective application of judicial decisions can be plotted along a line of Supreme Court cases beginning with *Linkletter v. Walker*, 381 U.S. 618 (1965), and coming full circle with *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993).[1] In *Linkletter*, the Supreme Court decided that its prior decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which created the "exclusionary rule" in criminal cases, should not be applied retroactively. In *Chevron Oil v. Huson*, 404 U.S. 97 (1971), the principal of prospective overruling was extended to civil cases. The *Chevron* Court set forth a set of factors to be weighed in determining whether or not a judicial decision should be given prospective or retroactive effect. 404 U.S. at 106-07. This Court in *Bradley*, *supra*, adopted this "balancing of equities" as the standard for choosing either retroactive or prospective application in West Virginia. 163 W.Va. 347, 256 S.E.2d 888.

However, "cracks in the wall" of this prospectivity doctrine began to appear with the dissents by Justice Harlan in *Desist v. United States*, 394 U.S. 244 (1969);

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[1] The cases plotted along this line include: *Stovall v. Denno*, 388 U.S. 25 (1967); *Desist v. United States*, 394 U.S. 244 (1969); *United States v. Estate of Donnelly*, 397 U.S. 286 (1970); *Mackey v. United States*, 401 U.S. 667 (1971); *Chevron Oil v. Huson*, 404 U.S. 97 (1971); *United States v. Johnson*, 457 U.S. 537 (1982); *American Trucking Assoc. v. Smith*, 496 U.S. 167 (1989); *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *James Beam v. Georgia*, 501 U.S. 529 (1991).

United States v. Donnelly, 397 U.S. 286 (1970) and *Mackey v.. United States*, 401 U.S. 667 (1971). These dissents foreshadowed and ultimately became the current law in the *James Beam* and *Harper* decisions. In *James Beam*, Justice Souter outlined the three "choices" in this area of law: (1) the decision may be made fully retroactive; (2) the decision may be made "purely prospective" in that it is not applied to either the parties in the law-making decision or to conduct or events occurring before that decision; and (3) the decision may be given "modified, or selective prospectivity" by applying it in the case it was announced, but made prospective as to facts predating the pronouncement. 501 U.S. at 535-538. As to "selective prospectivity," the Court held that it violated the fundamental legal precept that "litigants in similar situations should be treated the same":

> . . . selective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally. . . . "We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."

Id. at 538. Thus, *James Beam* extended the prohibition of "selective prospectivity" to civil cases previously established in *Griffith v. Kentucky*, 479 U.S. 314 (1987) in criminal cases. The *Griffith* Court had explained that "selective prospectivity" violated the constitutional precept that similarly situated litigants must be treated equally. 479 U.S. 314, 323. This rule is based upon fundamental principles of constitutional adjudication. *Id. See also United States v. Johnson*, 457 U.S. 537, 546. In *Harper*,

the court made clear that these "basic norms of constitutional adjudication" prohibited the "erection of selective temporal barriers" in civil cases. 509 U.S. at 86; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). *Harper's* rule of decision is made clear by Justice O'Connor in dissent: "In any event, the question of pure prospectivity is not implicated here. The majority first holds that once a rule *has been* applied retroactively, the rule must be applied retroactively to all cases thereafter." 509 U.S. at 116.

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, this Court cannot supplant the United States Supreme Court's retroactivity doctrine where it is based upon federal constitutional grounds;[2] *see also Adkins v. Leverette*, 161 W.Va. 14, 239 S.E.2d 496 (1977) (state may not construe its law below federal constitutional standards). The majority opinion's prospective application of *Broadnax* is clearly selective, having been retroactively applied in that decision, and therefore, violates "basic norms" of federal constitutional adjudication

[2] In general, it had been recognized that a state's highest court was free to create new common law rules and to decide to give them retroactive or prospective effect. *Great Northern v. Sunburst*, 287 U.S. 358, 364 (1932). However, if the retroactivity rule conflicts with federal constitutional standards, it cannot be applied. *Harper*, 509 U.S. at 99. Under *Harper* and *James Beam*, it may be questionable whether a state's highest court can even make a new rule "purely prospective." However, it is clear that "selectively prospective" application is prohibited by constitutional standards.

B. Equitable Considerations Apply To The Remedy, Not As A Trigger For A Choice Of Law, Where, As Here, Retroactive Application Is Mandated To Avoid Selective Prospective Application

The majority opinion misplaces the focus of the balancing of equities by using it as a tool to choose prospective application over retroactive application of *Broadnax*. However, the choice of retroactive application was already made in the *Broadnax* case itself. Having made this choice, any consideration of equities can only be applied as a remedial technique, not as a basis to apply the law selectively.

In *James Beam* the "balancing of equities" as a choice of law approach was jettisoned in instances of selective prospectivity as explained by Justice Souter, "Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. . . . " 501 U.S. at 544. Instead, the Court recognized that the *Chevron* analysis applied in the remedial phase of the case, (" . . . nothing we weigh here precludes consideration of individual equities when deciding remedial issues in particular cases . . . Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court . . . Nothing we say here deprives respondents of their opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided . . . "). 501 U.S. at 544. *See also Harper*, 509 U.S. at 101 ("We do not enter judgment

for petitioners, however, because federal law does not necessarily entitle them to a refund." Rather, the Constitution requires Virginia "to provide relief consistent with federal due process principles."). This shift of the *Chevron Oil* balancing of equities analysis from a choice of law to a remedial question, again, had its roots in Justice Harlan's earlier dissents. *See United States v. Estate of Donnelly,* 397 U.S. 286, 295-297 ("To the extent that equitable considerations, for example reliance, are relevant, I would take this into account in the determination of what relief is appropriate in any given case.") This much is, therefore, clear in the aftermath of *James Beam* and *Harper*: a court cannot selectively choose to allow some litigants to pursue a remedy, but then to "cut-off" that right to other subsequent litigants. Such selective allowance of remedies strikes at the heart of "unfairness and inequality." *James Beam* 501 U.S. at 543 (It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such as basis.)

This Court's selective application of prospectively of *Mitchell v. Broadnax* is particularly unfair. The majority opinion recognizes that Policyholders had important substantive rights that had accrued before the passage of W.Va. Code §§ 33-6-30(b-c). Maj.Op. at 19 (The effect of such amendatory language is to extinguish any litigable rights that have accrued.) The majority opinion recognized that policy holders had a legal right to enforce W. Va. Code § 33-6-30(k) in order to ensure that the insertion of terms, conditions and exclusions in a policy by an insurer is consistent with the premium charged. Maj.Op. at p.28, fn.28. Justice Starcher's concurring opinion describes the record evidence demonstrating that State Farm never

complied with subsection (k), but instead dramatically increased premiums while inserting numerous limitations to UIM coverage. Despite these widespread, recognized violations of established public policy, the majority opinion would cut off all remedies to policyholders because of potential, undocumented unfairness to State Farm. In effect, State Farm has been relieved of accounting for past wrongdoing which has admittedly injured Policyholders based upon unsubstantiated unfairness. Due process dictates that Policyholders are, at least, entitled to a remedy for established wrong-doing.

A wide range of equitable remedies exist to protect policyholders from an insurance company's past violations of subsection (k) under the claims asserted in the Complaint, including declaratory relief, injunctive relief, rescission, reformation, voiding of contract provisions, premium refunds, premium discounts and/or damages. Under the reasoning of *James Beam* and *Harper*, State Farm is entitled to argue that the imposition of one or more of these potential remedies does not apply or would violate their rights to Due Process. *Harper* at 100; *James Beam* at 543-44. By the same token, Policyholders have a right to establish on a factual record their right to an appropriate remedy consistent with principles of due process in order to receive a remedy for their injuries.

C. The Choice To Make *Broadnax* Selectively Prospective Violates Policyholders' Rights To Due Process Because *Broadnax* Did not Represent Any Change in The Law

The traditional function of courts is to apply the law as it exists when a case comes to bar. *James Beam*, 501 U.S. at 534. The assertion of non-retroactivity is therefore

implicated when a court expressly overrules a precedent upon which the contest would otherwise, be decided differently and by which the parties may previously have regulated their conduct. *Id.* This trigger for consideration of prospective application was *not* present here. *Broadnax* did not announce any new law nor did it change pre-existing law. *Broadnax* merely clarified what subsection (k) had always meant. A judicial clarification of the meaning of a statute states what the law as [sic] always been since its legislative enactment. *Rivers v. Roadway Express,* 511 U.S. 298, 313 (1994) (A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision giving rise to the construction.) Only the legislature has the power to decide the effective date of its enactment and when a court construes such a statute it is explaining is [sic] understanding of the law since the act became law. *Id.* at 313, fn. 12. Retroactivity analysis does not apply to decisions clarifying statutory law. *Fiore v. White,* 531 U.S. 225, 228 (2001); *see also State v. Klayman,* 2002 WL 31519926 (Fla. 2002)

The failure of the majority opinion to apply existing law to the controversy before the Court violates basic Due Process principles. *Fiore v. White,* 531 U.S. 225, 228 (2001). In *Fiore,* the Supreme Court held that it was a violation of Due Process for Pennsylvania to convict a person for a crime which was not a crime when it was committed. The *Fiore* Court determined that it was not a crime because through its certification procedure the Pennsylvania Supreme Court explained that its prior decision construing the statute under which the defendant had been convicted was a *clarification. Fiore v. White,* 562 Pa. 634, 757 A.2d 842 (2000). Recognizing that the clarification related back to the date of enactment of the subject

statute, the Court held that it would violate Due Process to convict a person for a crime which was not a crime when it was committed. 531 U.S. at 228-29. *See also State v. Klayman,* 2002 WL 31519926 (Fla. 2002) applying *Fiore* stating, "if a decision of a state's highest court is a clarification in the law, due process consideration dictates that the decision be applied in all cases, whether pending or final, that were decided under the same version (i.e., clarified version) of the applicable law.

Here, the majority opinion applies a different twist to the Due Process concern by failing to apply existing law in order to relieve State Farm from accounting for its violations of established law. This violates Policyholders' rights to Due Process of Law.

D. Rehearing Is Warranted

In general, this Court does not entertain an issue which was neither raised nor argued by the parties. *Teirnan v. Charleston Area Med. Ctr.,* 203 W. Va. 135, 140, 506 S.E.2d 578, 583 n.10 (1998). As an exception, this Court will *sua sponte* decide an issue based upon standing. *State v. Youngblood,* 2002 WL 31686430 (Nov. 27, 2002). Here, the issue of non-retroactivity was never raised because it was apparent from *Broadnax* itself that the decision was fully retroactive, thus giving Findley standing. Nevertheless, in order to address the retroactivity of *Broadnax, sua sponte,* the majority opinion characterized the issue as one of standing. Maj.Op. 25. Given the importance, complexity and constitutional dimension of the issues at stake, and to ensure fairness to the litigants, it is respectfully submitted that prospectivity of *Broadnax*

should only be decided after full briefing and input by the Parties.

The majority opinion's application of "selective prospectivity" presents substantial issues of public policy in West Virginia. "Selective prospectivity" allows courts the discretion to apply different laws to different litigants based upon perceived inequity. *Mackey v. United States,* 401 U.S. at 667, 679 (1971) (Harlan concurring) (". . . the Court's assertion of power to disregard current law . . . is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.") Such instability in the applicable law creates a substantial disincentive for litigants to seek the protection of the law based upon the fear that a court, in its discretion, may choose not to apply its protections. *James Beam,* 501 U.S. at 541. Here, Ms. Findley had a legal right to rely upon the basic protections underlying subsection (k) that her premiums would be appropriately adjusted upon the inclusion of an exclusion or limitation. She expended substantial efforts through counsel to enforce these established legal protections. Then on the day of reckoning, she discovered that the law upon which she had relied, and which had been in force since 1979, would not be applied to protect her because of some unidentified unfairness to State Farm.

Rehearing is also clearly warranted in order to reconsider whether the majority opinion is premised upon legal rules contrary to federal constitutional standards. Fairness and equality under the law clearly dictate that this Court grant rehearing in order to address these important questions of federal constitutional law.

BY: /s/ James M. Pietz by PAF
MALAKOFF DOYLE & FINBERG, P.C.
James M. Pietz, Esquire
Suite 200, The Frick Building
Pittsburgh, PA 15219
Phone: (412) 281-8400
Fax: (412) 281-3262
WILSON, FRAME, BENNINGER & METHENEY PLLC
J. Michael Benninger, Esquire
(W. Va. State Bar #312)
Paul T. Farrell, Jr., Esquire
(W. Va. State Bar #7443)
151 Walnut Street
Morgantown, WV 26505
Phone: (304) 292-9429
Fax: (304) 282-8427

CERTIFICATE OF SERVICE

I, J. Michael Benninger, Esq., do hereby certify that I have filed an original and (8) copies with the Clerk of the Supreme Court and served via Untied States Mail the "Appellant's Petition for Rehearing" upon the following counsel of record by serving a true copy thereof this 24rd [sic] day of December, 2002.

James A. Varner, Esquire
McNeer, Highland, McMunn & Varner
Fourth & Main Streets
BB&T Building
Clarksburg, WV 26301

J. Michael Weber, Esquire
Dean A. Furner, Esquire
Spilman Thomas & Battle, PLLC
The PM Center, Suite 203
417 Grand Park Drive
Parkersburg, WV 26101

Susan R. Snowden, Esquire
Martin & Seibert LC
1164 Winchester Avenue
Martinsburg, WV 25402

G. Thomas Smith, Esq.
Waters, Warner & Harris
P.O. Box 1716
Clarksburg, WV 26302-1716

/s/ J. Michael Benninger
J. Michael Benninger
(W. Va. State Bar No. 312)

APPENDIX G

No. 30842
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

LAURA A. FINDLEY, individually
and on behalf of all other
persons similarly situated,

Appellant/Plaintiff below,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Appellee/Defendant below,

FROM THE CIRCUIT COURT
OF BARBOUR COUNTY, WEST VIRGINIA

APPELLANTS' REPLY IN SUPPORT OF THE PETITION FOR REHEARING

J. Michael Benninger, Esquire
Paul T. Farrell, Jr., Esquire
Wilson, Frame, Benninger & Metheney, P.L.L.C.
151 Walnut Street
Morgantown, WV 26505
Phone: (304) 292-9429

James M. Pietz, Esquire
Malakoff Doyle & Finberg, P.C.
Suite 200, The Frick Building
Pittsburgh, PA 15219
Phone: (412) 281-8400

Counsel for Appellant/Plaintiff Below

The Responses to The Petition For Rehearing misunderstand that the holding of *Harper v. Dept. Of Taxation*, 509 U.S. 86 (1993) is based upon federal Due Process and Equal Protection constitutional grounds. In rejecting an argument that the state decision rested upon "independent and adequate" state law grounds, the Supreme Court in *Harper* plainly ruled, "The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever state freedom state courts may enjoy to limit retroactive operation of their own interpretations of state law, . . . cannot extend to their interpretations of federal law." *Id.* at 100. The meaning of this language is obvious – state courts are free to fashion their own retroactivity doctrines *so long as they comport with the Supremacy Clause*. Therefore, while the reasoning of *Great Northern v. Sunburst Oil*, 287 U.S. 358 (1932) may allow state courts to fashion a rule of "pure prospectivity," it is clear from *Harper* that state courts cannot fashion a retroactivity doctrine based upon "selective prospectivity" since it would be in violation of the Untied States Constitution.

Harper's prohibition of "selective prospectivity" is based upon federal Due Process and Equal Protection principles which apply to the states through the Supremacy Clause. *Harper's* reasoning was derived from constitutional principles earlier identified by Justice Harlan. *See United States v. Johnson*, 457 U.S. 537, 546 (1982) (explaining the 3 "norms of constitutional adjudication" identified by Justice Harlan). The Fourteenth Amendment has long been recognized to restrict a state court from applying the law unequally to a class of those similarly

situated as explained in *Maxwell v. Dow*, 176 U.S. 581 (1900):

> If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person shall or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances.

See also Sexton v. Berry, 233 F.2d 220 (6th Cir. 1956) (" . . . all litigants similarly situated may appeal to the courts for relief and defense under like conditions, with like protection and without conditions.")

The out-of-state cases relied upon by the Responses are inapposite. *City of New Bern v. The New Bern-Craven Board*, 338 N.C. 430, 450 S.E.2d 735 (1994) involved "pure prospectivity," not "selective prospectivity," and therefore did not present the Fourteenth Amendment issue. In *Beavers v. Johnson Controls*, 118 N.M. 391, 881 P.2d 1376, 1383, fn. 8 (1994), the court expressly stated "The possibility that selective prospectivity might deprive parties in a subsequent case of equal protection of the laws raises an interesting question, but since the question is not presented here we have not researched it and do not address it." The *Beavers* court found the rule prohibiting selective prospectivity "quite compelling" and therefore fashioned its own retroactivity rule protecting litigants from the unfairness presented by selective prospectivity. 118 N.M. at 397-98, 881 P.2d at 1382-83. ("Because of the

compelling force of the desirability of treating similarly situated parties alike, we adopt a presumption of retroactivity. . . . ")

Fairness and equality under the law clearly dictate that this Court grant rehearing in order to address these important questions of federal constitutional law.

BY: /s/ James M. Pietz
MALAKOFF DOYLE &
FINBERG, P.C.
James M. Pietz, Esquire
Suite 200, The Frick Building
Pittsburgh, PA 15219
Phone: (412) 281-8400
Fax: (412) 281-3262

WILSON, FRAME, BENNINGER &
METHENEY, PLLC
J. Michael Benninger, Esquire
(W. Va. State Bar #312)
Paul T. Farrell, Jr., Esquire
(W. Va. State Bar #7443)
151 Walnut Street
Morgantown, WV 26505
Phone: (304) 292-9429
Fax: (304) 282-8427

CERTIFICATE OF SERVICE

I, James M. Pietz, do hereby certify that I have filed and forwarded by Federal Express **"Appellants Petition for Rehearing"** and served upon the following counsel of record by serving a true copy thereof, by Federal Express, this 14th day of January, 2003.

James A. Varner, Esquire
McNeer, Highland, McMunn & Varner
Fourth & Main Streets
BB&T Building
Clarksburg, WV 26301

J. Michael Weber, Esquire
Dean A. Furner, Esquire
Spilman Thomas & Battle, PLLC
The PM Center, Suite 203
417 Grand Park Drive
Parkersburg, WV 26101

Susan R. Snowden, Esquire
Martin & Seibert LC
1164 Winchester Avenue
Martinsburg, WV 25402

/s/ James M. Pietz

(2)

No. 02-1531

Supreme Court, U.S.
FILED
MAY 20 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LAURA A. FINDLEY, et al.,

Petitioners,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

**On Petition For A Writ Of
Certiorari To The Supreme Court
Of Appeals Of West Virginia**

BRIEF IN OPPOSITION

CLARENCE E. MARTIN, III
Counsel of Record
SUSAN R. SNOWDEN
RONALD S. ROSSI
MARTIN & SEIBERT, L.C.
1164 Winchester Avenue
Martinsburg, West Virginia 25401
(304) 267-8985

*Counsel for Respondent
Nationwide Mutual Insurance
Company*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CORPORATE DISCLOSURE STATEMENT

Nationwide Mutual Insurance Company is incorporated under the laws of the State of Ohio, with its home office and principal executive office in Columbus, Ohio, and is not a publicly owned company.

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Mary C. Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies,* 44 Ala.L.Rev. 421 (1993) 5

Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings and Judicial Takings,* 2001 Utah L.Rev. 379 (1993) 14, 15

INTRODUCTION

Respondent, Nationwide Mutual Insurance Company, requests that this Court deny the Petition for Writ of Certiorari filed by Laura A. Findley, et al., seeking review of the decision of the Supreme Court of Appeals for the State of West Virginia entered in this matter on December 6, 2002, the Order of the Supreme Court denying rehearing of January 16, 2003, and the January 23, 2003 Order entering final judgment on all claims and all parties.

COUNTER-STATEMENT OF THE CASE

This matter first came before the Circuit Court of Barbour County, West Virginia, in November 2000, as an individual filing by Laura Findley. On or about May 8, 2001, Ms. Findley moved the Circuit Court of Barbour County for leave to amend her Complaint to assert a putative class action. The Motion for Leave to Amend was granted by Order of the Circuit Court dated July 10, 2001, and on July 25, 2001, the Petitioner's First Amended Class Action Complaint was filed.

The underlying premise behind the Petitioner's First Amended Class Action Complaint is that the insurer did not comply with what the Petitioner believed was mandated by the West Virginia Supreme Court of Appeals in its decision of *Mitchell v. Broadnax,* 537 S.E.2d 882 (2000). Specifically, the *Mitchell* case held that the insurer was required to provide a policy premium discount for the "owned but not insured" exclusion in the automobile policy of insurance issued to the insured in *Mitchell* and that it breached its obligation by failing to appropriately adjust the

premium in accordance with the alleged statutory mandate of West Virginia Code §33-6-31(k).

In response to the plethora of litigation being instituted in the state in the aftermath of the *Mitchell* decision, the West Virginia Legislature enacted West Virginia Code §33-6-30. The Legislature noted that "certain classes of persons are seeking refunds of insurance premiums and seeking to void exclusions and other policy provisions on the basis that insurance companies allegedly failed to provide or demonstrate a reduction in premiums charged in relation to certain terms or exclusions incorporated into policies of insurance." W.Va. Code §33-6-30(b)(2).[1]

The Respondent, Nationwide Mutual Insurance Company, is the Defendant in a putative class action bearing substantially similar factual and legal allegations to those present in the *Findley v. State Farm*, 576 S.E.2d 807 (W.Va. 2002) matter. That case, *Audia v. Nationwide*

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[1] The West Virginia Legislature, being concerned with the litigation seeking refunds of premiums over a twenty (20) year period as well as claims for additional coverage, wrote:

> (c) Nothing in this chapter may be construed as requiring specific line item premium discounts or rate adjustments corresponding to any exclusion, condition, definition, term or limitation in any policy of insurance, including policies incorporating statutorily mandated benefits or optional benefits which as a matter of law must be offered. Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter.

W.Va. Code §33-6-30(c)

Mutual Insurance Co., Civil Action Number 00-C-79, is being prosecuted by the same law firm representing Laura Findley in the instant matter. The *Audia* matter is currently pending under a stay in the Circuit Court of Taylor County, West Virginia. Nationwide Mutual Insurance Company, because of the interest it has in the application of certain legal principles which would bar the *Audia* action from proceeding, filed a brief as an *Amicus Curiae* before the West Virginia Supreme Court of Appeals in the instant case. Subsequently, Nationwide Mutual Insurance Company moved to intervene in the *Findley* appeal and was granted leave to do so. In light of the fact that Nationwide was not involved in the development of the facts underlying the Circuit Court's decision in the *Findley* matter, Nationwide takes no position with regard to the specific factual development in *Findley*. *See Findley v. State Farm,* 576 S.E.2d 807 (W.Va. 2002).

It is important, however, to note that West Virginia is a state which requires preapproval by the appropriate regulatory body before rates can be charged or forms utilized by the insurance industry within its state's borders. In the instances in which Petitioner Findley complains, State Farm Mutual Insurance Company had received the necessary approval of the Insurance Commissioner prior to charging insurance rates and prior to utilizing the policy forms which were in question in the case. The Insurance Commissioner of the State of West Virginia has the exclusive role, by statute, to approve policy rates and forms in West Virginia.[2] This role has

[2] Specifically, West Virginia Code §33-6-8(a) provides: "... except as provided in section 8 ... Article 17 of this Chapter (fire and marine

(Continued on following page)

been statutorily delegated to the Insurance Commissioner by the Legislature and requires expertise which courts are normally ill-suited to provide. The Petitioner's position would have required the West Virginia Supreme Court of Appeals to engage in retroactive rate making. It was undisputed that the rates and forms at issue in the case were approved by the entity vested with the authority to make the decision, that being the Insurance Commissioner. *See* W.Va. Code §§33-6-8, 33-6-9(b), 33-20-4, *et seq.*

REASONS FOR DENYING CERTIORARI

I. Petitioner seeks federal review of the inherent power of a state's highest court to decide matters of state statutory construction.

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), Justice Brandeis noted that "[i]t is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." As

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forms), no insurance policy form . . . shall be delivered or issued for delivery in this state by an insurer unless it has been filed with and approved by the Commissioner."

Justice Cardozo further acknowledged in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), two (2) years later, "[t]his is not a case where a court, in overruling an earlier decision, has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. . . . This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal." *Id.* 287 U.S. at 364. As one commentator stated, "it is constitutional for state courts to simply acknowledge that they are making new law and to choose whether to apply it to the parties before the court or only in future cases." Mary C. Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 Ala. L. Rev. 421, 426 (1993). Seventy (70) years later, the Petitioner's stand is not novel. The Petitioner is seeking to have this Court review a state court's decision which was based entirely on an interpretation of state law. While this Court has modified its theories in *Sunburst* somewhat with regard to instances where federal law is employed, the basic premise that state courts are the ultimate authority on interpretation and application of state law, when no constitutional infringements are made, still holds true today and remains intact.

This Court has recognized that the choice for any state of retroactive versus prospective application of a judicial decision may be determined by the juristic philosophy of the judges of the courts, their conception of law, its origin and nature. *Sunburst,* 287 U.S. at 365. This general principle of law is unaffected by *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 97 (1993), which holds that when the United States Supreme Court applies a rule of

federal law to the parties before it, that rule is the controlling interpretation of federal law and is to be given retroactive application. "When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Associations, Inc., et al. v. Smith,* 496 U.S. 167, 177 (1990) (citing *Great Northern Railway,* 287 U.S. at 364). "As Justice Cardozo discerned, prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding." *Smith, et al.,* 496 U.S. at 197. Even while curtailing the rights of federal courts, this Court continues to decide upon the retroactivity of federal decisions. However, Justice Thomas acknowledged that state courts still have the freedom to limit the retroactive operation of their own interpretation of state law. *Harper,* 509 U.S. at 99 (citations omitted).

The West Virginia Supreme Court, in applying its previous decision of *Mitchell* to *Findley*, was exercising its inherent power to interpret state law in "the light of new understanding." In Syllabus Point 6 of *Mitchell*, the West Virginia Supreme Court held that "[w]hen an insurer has failed to satisfy the statutory criteria of W.Va. Code §33-6-31(k) (Repl.Vol. 1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy." *Mitchell,* 537 S.E.2d at 884. After *Mitchell*, the West Virginia Legislature undertook to amend §33-6-30 (2002) in light of the West Virginia Supreme Court's interpretation of West Virginia Code §33-6-31(k) (Repl.Vol. 1996). Then, the West Virginia Supreme Court in the instant case, while still adhering to *stare decisis* and "in light of new understanding," held that West Virginia Code

§33-6-30 (2002) "extinguish[ed] any litigable rights that have accrued as a result of [the] Court's holding in *Mitchell v. Broadnax*, 537 S.E.2d 882 (W.Va. 2000), and . . . foreclose[d] lawsuits that have been initiated as a result thereof." *Findley,* 576 S.E.2d at 820. The Legislature had called the legislative enactment a "clarification" of the law so that it would have a retroactive effect and act as a bar to all pending litigation. However, the Petitioner argued before the Supreme Court of West Virginia that the legislative amendment was *not* a clarification of the law but was a substantive change which affected the Petitioner's rights.

In response to the Petitioner's argument, the West Virginia Supreme Court ruled that "in the case *sub judice*, the legislative amendments to W.Va. Code §§33-6-30(b-c) are most certainly substantive in nature." *Findley, Id.* at 820. Furthermore, in reaching this decision, the West Virginia Supreme Court noted that its decision as "'. . . the highest court of a State in the construction of its statutes . . . is the controlling rule of decision in federal courts, where there is no federal question.'"[3] *Findley*, 576 S.E.2d at 821, n. 21 (quoting *Syl. Pt.3*, in part, *Clarksburg Elec. Light Co. v. City of Clarksburg*, 35 S.E. 994, 996 (W.Va. 1900) ("The decision of the state court of last resort upon rights dependent alone upon its law, its statutes, is conclusive upon the Federal judiciary.")). *See also, Syl. Pt.4, State v. Wender*, 141 S.E.2d 359 (W.Va. 1965) ("In construing our state constitution, the Supreme Court of

[3] The West Virginia Supreme Court engaged in this analysis because of conflicting federal court opinions concerning the statutory interpretation of West Virginia Code §33-6-31(k).

Appeals is not bound by rulings of courts of other states or of the United States Supreme Court."). No federal question was presented to the West Virginia Supreme Court of Appeals when it exercised its inherent power in applying state law to hold that *Mitchell* applies "only to those exclusions to insurance coverage incorporated into policies of motor vehicle insurance on or after the effective date of our decision . . . and before the effective date of the Legislature's amendments to W.Va. Code §33-6-30 (2002) (Supp.2002), . . . " *Syl. Pt.7, Findley,* 576 S.E.2d at 810.

The Petitioner contends that this Court's decision in *Harper* which expanded upon this Court's decision in *James B. Beam Distilling Company v. Georgia, et al.*, 501 U.S. 529 (1991), should apply "with equal force to rules of state law." *See* Petition for Writ of Certiorari p.7. However, by the clear and unambiguous language of the opinion itself, *Harper* applies only to the United States Supreme Court when it considers questions involving federal law.

> [W]e accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 509 U.S. at 97. State courts, in applying their own rules of the appropriateness of the applicability of retroactivity to the parties before the state court, adhere to the principle that "[w]hen questions of state law are at issue, state courts generally have the authority to determine the

retroactivity of their own decisions." *American Trucking,* 496 U.S. at 177 (citing *Great Northern Railway,* 287 U.S. at 364). As the Fourth Circuit has observed, there is a "noticeable absence in *Harper* of any statement that *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), is overruled for use in civil cases involving a question of 'pure' prospectivity or that all prospective decision making is prohibited." *Fairfax Covenant Church v. The Fairfax County School Board,* 17 F.3d 703, 710 (1994).

The New Mexico Supreme Court has recognized that "[i]t is within the inherent power of a state's highest court to give a decision prospective or retroactive application without offending constitutional principles." *Lopez v. Maez,* 651 P.2d 1269, 1276 (N.M. 1982) (citing *Molitar v. Kaneland Community Unit District No. 302,* 163 N.E.2d 89 (Ill. 1959), *cert. denied,* 362 U.S. 968 (1960)). Even after *Beam* and *Harper,* the New Mexico Supreme Court continued to observe that New Mexico jurisprudence was more consistent with the views of the minority in *Harper* and declined an invitation to follow the *Harper* rule when considering the retroactive or prospective application of a judicial decision in a civil case involving state law. *Beavers v. Johnson Controls World Services, Inc.,* 881 P.2d 1376 (N.M. 1994). Likewise, the Court of Appeals of Wisconsin also declined to follow *Harper,* noting that:

> First, *Harper* only applies to the interpretation of federal law by the United States Supreme Court. Second, a radical change in the manner in which Wisconsin appellate courts approach retroactivity analysis is within the exclusive superintending authority of the Wisconsin Supreme Court. Finally, it is within the inherent power of the

> state's highest court to give a decision prospective or retrospective application without offending constitutional principles.

In re Thiel v. Thiel, 625 N.W.2d 321, 327 (Wis. 2001) (citations omitted).

In North Carolina, its Supreme Court declined to follow the *Harper* Court's retroactivity analysis finding that "[b]ecause the case before us involves an issue of state constitutional law, the foregoing [analysis] from *Harper* is inapplicable. . . . " *City of New Bern v. The New Bern-Craven Board of Education*, 450 S.E.2d 735, 743 (N.C. 1994). The Supreme Court of Pennsylvania, as recently as December 31, 2002, determined the retroactivity analysis of *Harper* to be irrelevant to cases dealing only with state law. *Commonwealth v. Grant,* 813 A.2d 726 (Pa. 2002). The Pennsylvania Court noted that the "decision to apply a new rule of law is within the discretion of the court." *Id.* at 738. The Court went on to note that whether a new rule of law is applied retroactively or prospectively is solely within its own discretion. *Id.* Like these states, the West Virginia Supreme Court has continually held that "' . . . the highest court of a State in the construction of its statutes . . . is the controlling rule of decision in federal courts, where there is no federal question.'" *Findley*, 576 S.E.2d at 821 n. 21.

The West Virginia Supreme Court of Appeals adopted the *Chevron Oil* analysis for determining the retroactivity or prospectivity of its statutes and common law in the case of *Bradley v. Appalachian Power Co.,* 256 S.E.2d 879 (W.Va. 1979). Accord *Syl. Pt.4, Kincaid v. Mangum,* 432 S.E.2d 74 (W.Va. 1993); *Syl. Pt.4, King v. Kayak Mfg. Corp.*, 387 S.E.2d 511 (W.Va. 1989). The West Virginia Supreme Court has recognized that "[a]lthough statutes

normally operate prospectively only, judicial decisions ordinarily operate retroactively." *Ashland Oil, Inc. v. Rose,* 350 S.E.2d 531 (W.Va. 1986). The West Virginia Supreme Court of Appeals has also explained that "[t]he courts of this country long have recognized exceptions to the rule of retroactivity, however." *Id.* at 534.

The Petitioner argues that the West Virginia Supreme Court's decision not to apply *Mitchell* retroactively to her declaratory judgment action seeking the benefits of the *Mitchell* decision was a violation of due process and equal protection. Petitioner now asserts to this Court that *Mitchell* did not announce a new law, or change pre-existing law. *See* Petition for Writ of Certiorari, p.17. However, the West Virginia Supreme Court found differently. The state court found that *Mitchell* did in fact involve "substantive law, namely W.Va. Code §33-6-31(k), . . . " and that the holdings in *Mitchell* were "not clearly foreshadowed." *Findley*, 576 S.E.2d at 823 (citing *Syl. Pt.5,* in part, *Bradley*, 256 S.E.2d 879. Furthermore, the state court recognized that "while we long have held exclusions in insurance policies to be valid, we had not, prior to *Mitchell*, delineated the express requirements therefor contained in W.Va. Code §33-6-31(k)." *Id.* (footnotes omitted). Therefore, after applying the factors enumerated in *Bradley*, the West Virginia Supreme Court of Appeals declined to apply *Mitchell* retroactively to the Petitioner "in order to shield insurers from the imposition of augmented liabilities that did not clearly exist prior to the announcement of such holdings [in *Mitchell*]." *Id.*

The Petitioner also argues that the West Virginia Supreme Court's decision that "retroactively benefit[s] litigants in an initial case construing a statute, but then den[ying the same] to similarly situated litigants in

subsequent cases, . . . " conflicts with the constitutional principles of due process and equal protection. Petition for Writ of Certiorari, p.10. However, the West Virginia Supreme Court has unequivocally accepted that the *Bradley* factors for "determining whether to give full retroactivity to an opinion of [the West Virginia Supreme Court of Appeals] overruling prior precedent(s), or announcing any new rule which was not clearly foreshadowed in prior cases" can operate to accomplish exactly the result which the Petitioner argued in the state court below and to which Petitioner now objects. *Geibel v. Clark,* 408 S.E.2d 84, 89 (W.Va. 1991).

In *Geibel,* the West Virginia Supreme Court was faced with the issue of whether or not *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983) should be applied to invalidate a sheriff's tax sale which had been conducted twenty (20) years prior to the *Mennonite Board of Missions* decision. While the West Virginia Supreme Court acknowledged that it had previously and retroactively applied *Mennonite Board of Missions* sheriff's tax sale in *Lilly v. Duke,* 376 S.E.2d 122 (W.Va. 1988), the *Lilly* decision "was however, silent as to the retroactive effect, in general," *Geibel*, 408 S.E.2d at 88. After analyzing and applying the *Bradley* factors to the *Geibel* case, the state court found that it would not now generally apply *Mennonite Board of Missions* retroactively to sheriff's tax sales which had been conducted prior to the *Mennonite Board of Missions* decision because to do so would invalidate "[t]housands of sheriffs' tax sales . . . " even though, as the state court had acknowledged, it had previously applied *Mennonite Board of Missions* out of necessity to *Lilly,* 408 S.E.2d at 90.

The Petitioner's argument cannot succeed in the case *sub judice* because the state court below correctly construed and applied West Virginia law to the interpretation of a West Virginia statute and West Virginia common law regarding the issuance and governance of automobile insurance contracts within the State of West Virginia. The Petitioner cannot and has not established that there is a federal question presented in either the facts or legal inquiry in the case *sub judice*. The Petitioner is seeking this Court's review of a state court's decision to prospectively apply a state statute and state common law which is a request outside this Court's jurisdiction. 28 U.S.C. §1257(a).[4] The West Virginia Supreme Court has continually recognized that "'. . . the highest court of a State in the construction of its [state law] . . . is the controlling rule of decision in federal courts, where there is no federal question.'" *Findley, supra.*

The Petitioner asserts that the decision of the West Virginia Supreme Court in *Findley* violated the Due Process and Equal Protection Clauses of the United States Constitution. Constitutional protection afforded by the Due Process Clause encompasses fundamental, non-economic individual rights. *See Bowers v. Hardwick,* 478

[4] The Respondent recognizes that the Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a) by asserting that "[w]here the grounds of a state court's decision supplies a new and unexpected basis for a claim of a federal right by the defeated party, the claim may be raised and preserved by way of a Petition For Rehearing." *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., supra.* However, the state court's decision below did not "supply a new and unexpected basis for a claim of *federal right.*" (Emphasis added). Therefore, this Court does not have jurisdiction over the instant case.

U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977). Thus, state laws which infringe upon "fundamental" rights are protected by substantive due process and are subject to strict scrutiny. *See Washington v. Glucksberg,* 521 U.S. 702 (1997). The Petitioner has not alleged that her fundamental rights have been violated. Petitioner has argued that the Court has virtually abandoned substantive due process as it is applied to economic regulation. However, it is well settled that "rights having economic ramifications are entitled to no protection under the Due Process Clause . . . " Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 392 (1993). *See also Nebbia v. New York,* 291 U.S. 502 (1934).

In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), this Court held that no federal constitutional issues arise when state courts define property or when they change their definitions of property, and therefore, this Court lacks jurisdiction to review state court decisions. *Id.* at 455-56. While procedural Due Process "extends to state action through its judicial as well as through its legislative, executive or administrative branches of government," the Due Process Clause does not prevent courts from changing their interpretation of state common law. *Brinkerhoff-Faris Trust & Savings Co.*, 281 U.S. at 680. Finally, in *Sunburst*, Justice Cardozo stated that no federal constitutional question arises when state courts "defin[e] the limits of adherence to precedent." *Sunburst*, 287 U.S. at 364-65. Therefore, as long as the state court complied with acceptable procedural due process requirements and sufficiently founded its decision upon a "fair and substantial basis," the state court's decision regarding property rights will not be disturbed because no constitutional

obligations were avoided. *See Demorset v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944); *Broad River Power Co., v. State of South Carolina, ex rel. Daniel*, 281 U.S. 537, 540-42 (1930); *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 655 (1927); *Nickel v. Cole*, 256 U.S. 222, 225 (1921); *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). *See also* Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 392 (1993). The West Virginia Supreme Court did not violate the Petitioner's Due Process rights in deciding not to retroactively apply *Mitchell* to the Petitioner because the Petitioner's fundamental rights were not violated and the West Virginia Supreme Court provided a "fair and substantial basis" for its decision in *Findley* under the *Bradley* retroactivity/prospective application analysis.[5] The Petitioner has also asserted that

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[5] The Petitioner argues that if a court changes the law and selects "chance beneficiaries," then the Due Process Clause is violated. Petition for Writ of Certiorari, p.17. The phrase "chance beneficiaries" first made an appearance in *Stovall v. Denno*, 388 U.S. 293, 301 (1967) wherein this Court noted that "[i]nequity arguably results from according the benefit of a new rule to the parties of the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue, but we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for the adherence to sound principles of decision-making." *Id.* at 301. *Stovall* was later overruled by *Griffith v. Kentucky*, 479 U.S. 314 (1987) which held that a newly announced constitutional rule for conducting criminal prosecutions must be applied retroactively to all cases, state or federal, pending on direct review or not yet final when the rule was announced. *Griffith*, 479 U.S. at 328. However, as was argued above, states are still free to choose either retroactive, prospective, or selective prospective application of state laws and that a state court is still the ultimate authority on interpretation and application of state law, when no constitutional infringements are made.

the West Virginia Supreme Court's decision has violated her right to Equal Protection. Again, however, the Petitioner's argument must fail. It is generally known that "the Equal Protection Clause does not forbid classifications; it simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citation omitted). This Court has further stated that "[a]ccordingly, this Court's cases are clear that unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect classification, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.* (citation omitted).

The Petitioner has not stated any grounds which would support her claim that she, as an alleged similarly situated litigant, was deliberately selected "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Petition for Writ of Certiorari p. 16.[6] In addition, the Petitioner has not alleged how she is a

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[6] In support of her argument that the "Due Process Clause protects against arbitrary applications of law to selected beneficiaries," Petitioner cites to *Oyler v. Boles*, 368 U.S. 448, 456 (1962), for the proposition that the Due Process clause has been applied to prohibit a state from selectively applying a law to similarly situated litigants where "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." However, the holding of *Oyler* is contrary to the Petitioner's assertion but, correctly stated, stands for the proposition that "the conscious exercise of some selectivity in enforcement [of West Virginia's recidivist statute] is not in itself a federal constitutional violation" without proof or allegations that the "selection [with regard to the Petitioner] was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary

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"similarly situated litigant" to the litigants in *Mitchell*. The Equal Protection Clause comprises a general rule that states must treat like cases alike but may treat unlike cases accordingly. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("'[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'") (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). It is important to note that the Petitioner's cause of action did not arise until the pronouncement of the *Mitchell* decision.

II. The choice of the West Virginia Supreme Court of Appeals to decide retroactive versus prospective application of the *Mitchell* decision was not violative of federal constitutional principles.

The *Chevron Oil* decision was, for a significant period of time, a sound and workable rule of judicial decision-making. It appears to have been employed only in rare circumstances where the impact of a "new" ruling would be especially burdensome to the justifiable reliance interests of one party or another. State courts had applied the equitable principles enunciated in *Chevron Oil* to determine the retroactivity of both state and United States Supreme Court decisions.

This Court has recognized that the choice for any state of retroactive versus prospective application of a

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classification." *Id.* at 456. The Court found that the Petitioner, in *Oyler*, had not alleged grounds to support a finding of a denial of equal protection and thus affirmed the lower court's decision. *Id.*

judicial decision may be determined by the juristic philosophy of the judges of the state courts, their conception of law, its origin and nature. *Sunburst,* 287 U.S. 358 (1932). The Petitioner, however, seeks to have this Court rule that its decisions in *Harper*, 509 U.S. 86 (1993) and its progeny hold that it is unconstitutional for a state supreme court to apply its decisions prospectively. Petitioner ignores the fact that the general principle set forth in *Sunburst* is unaffected by *Harper*.

The decision in *Harper* stands only for the proposition that when the United States Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and is to be given retroactive application. *Harper*, 509 U.S. at 97. In *Harper,* this Court was confronted with the issue of retroactively versus prospectively applied rules of law. Retired federal employees sought refunds for state income taxes contending that the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803 (1989) should be applied retroactively. The Court in footnote nine (9) of its decision, stated:

> Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that "the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case" and that the federal law applicable to a particular case does not turn on "whether [litigants] actually relied on [an] old rule [or] how they would suffer from the retroactive application" of a new one. *James Beam Distilling Co. v. Georgia,* 501 U.S. 529, 543, 111 S.Ct. 2439, 2447, 115 L.Ed.2d 481 (1991).

Harper, 509 U.S. at 95.

It should be noted that this Court referred to "federal law" in its analysis in the *Harper* decision. Even more important, the Court adopted a rule that it believed "fairly" reflected the position of the majority of the Justices in *Beam*. The new rule of law was espoused that "when this Court applies a rule of *federal law* to the parties before it, that rule is the controlling interpretation of *federal law* and must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether such events predate or postdate announcement of the rule." *Harper*, 509 U.S. at 97 (emphasis added).

Irrespective of the obvious fact that *Harper* applied to federal law, Justice Scalia, concurring in *Harper,* noted that of the four justices who would still apply *Chevron Oil,* two would find *Davis* retroactive and two would find it not retroactive. As Justice Thomas noted "[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, (it) cannot extend to their interpretations of federal law." *Id.* at 99 (citations omitted).

The decision of the West Virginia Supreme Court of Appeals in this case solely addresses West Virginia statutory construction. No federal law is implicated in the analysis by the Court of its own insurance statutes as enacted by the West Virginia legislature. As the Court noted, "our decision in *Mitchell* involved a matter of substantive law, namely, West Virginia Code §33-6-31(k) which had, prior to our decision therein, received sparse treatment in our judicial decisions and had not been amended by the legislature since its original enactment in 1979." *Findley*, 576 S.E.2d 807.

III. The jurisprudence of the State of West Virginia clearly allows for the prospective application of the *Mitchell* opinion.

The West Virginia Supreme Court, in its analysis of prospective versus retroactive application of the *Mitchell* decision, applied the standards that it had previously set forth in *Bradley,* 256 S.E.2d 879. In *Bradley*, *Syl. Pt.*5, the Supreme Court set forth the criteria to determine whether to extend full retroactivity of its decision. The Court stated that the following factors were to be considered:

> First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally-settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other

> courts which have determined the retroactive/prospective question in the same area of the law and their overruling decisions.

Id. at 880-881.

This rule was also applied in the case of *Devrnja v. West Virginia Board of Medicine*, 408 S.E.2d 346 (W.Va. 1991). In *Devrnja,* the West Virginia Supreme Court applied the *Bradley* test to determine the retroactive versus prospective application of its decisions. The Court distinguished the application of *Beam Distilling* in resolving the selective prospectivity issues. As the West Virginia Supreme Court noted "[w]e decline to unravel this tangled federal scheme because we deal with a state adjudication based on state constitutional grounds." *Devrnja*, 408 S.E.2d at 349. West Virginia's Supreme Court has remained consistent in its analysis of retroactive and prospective application of the law. This analysis is patterned after the West Virginia Supreme Court's belief that "in construing our state constitution, the Supreme Court of Appeals is not bound by rulings of courts of other states or of the United States Supreme Court." *Clarksburg Elec. Light Co.*, 35 S.E. at 996.

In the case of *Sizemore v. State Workman's Comp. Commissioner,* 219 S.E.2d 912 (W.Va. 1975), the West Virginia Supreme Court of Appeals noted that when a request for retroactive application of the law is made it will cautiously consider whether such retrospective application is warranted. "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be

retroactive in application." *Id.* at *Syl. Pt.3.* The Court furthered its retroactive analysis in the case of *Bowers v. Wurzburg,* 519 S.E.2d 148 (W.Va. 1999), when it declined to apply its decision retroactively where, before its issuance, there existed "lack of clear authority in the state which resulted in uncertainty of the law as to the issue that it decided." *Id.* at 166.

It is the type of analysis adopted by the West Virginia Supreme Court of Appeals in the *Bradley* case which gives the state court the discretion, in extraordinary cases, to temper the harshness of a rule of retroactivity. Such an approach is generally appropriate in areas where a single decision of the Court would introduce a far reaching change in the law that could impose a dramatic new liability that was not foreseeable based upon settled understandings that had accumulated since the enactment of the legislation which was being construed. This principle was recognized by the West Virginia Supreme Court in *Findley,* when the Court acknowledged that the Petitioner's claim for relief or the request that the "Court retroactively apply our holdings in *Mitchell v. Broadnax* so as to bring within its scope an insurance contract which was entered into before this Court's decision therein, and which contract has contained the allegedly objectionable language since the date of the policy issuance." *Findley,* 576 S.E.2d at 822. Since the Supreme Court's decision in *Mitchell* involved a matter purely of substantive law which was one that had received "sparse" treatment by the judiciary and had not received legislative amendment since 1979, the Court concluded that the decision in *Mitchell* should not be applied retroactively to permit prosecution of the claim. *Id.* at 823.

The retroactive application of the *Mitchell* decision would have sent an ominous signal to the insurance carriers in the State of West Virginia concerning their ability to rely upon the West Virginia Insurance Commissioner's approval of rates and forms. The West Virginia Supreme Court's analysis as set forth succinctly in *Bradley,* provides a standard for protecting reliance interests of the insurance industry in a manner that is equitable to both the insurer and the insured. As noted by the West Virginia Supreme Court " . . . the substantial public policy issues implicated in our holdings, and explicitly identified by the Legislature in W.Va. Code §33-6-30(b), mitigate in favor of a rule of prospectiveness." *Id.*

However, the Court was also cognizant of the right of an insured to bring a cause of action under W.Va. Code §33-6-30(b-c). A specific holding of the state Supreme Court was that " . . . the holdings of *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000), which allow insureds to pursue a cause of action against insurers to enforce the requirements of W.Va. Code §33-6-31(k) (1995) (replacement volume 1996), apply only to those exclusions to insurance coverage incorporated into policies of motor vehicle insurance on or after the effective date of our decision therein, i.e. February 18, 2000, and before the effective date of the Legislature's amendments to W.Va. Code §33-6-30 (2002) (Supp. 2002), i.e. June 5, 2002." *Id.* The Court was cognizant of the fact that the requirements adopted in *Mitchell* were a "heretofore silent prerequisite" in holding that an insurance policy could only contain an exclusion if the issuing insurer had appropriately adjusted the corresponding premium. *Id.* at 893. By declining to apply the holdings in *Mitchell* retroactively, the Court shielded the insurers from the "imposition of augmented

substantive liabilities that did not clearly exist prior to the announcement of such holdings." *Id.*

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CLARENCE E. MARTIN, III
Counsel of Record
SUSAN R. SNOWDEN
RONALD S. ROSSI
MARTIN & SEIBERT, L.C.
1164 Winchester Avenue
Martinsburg, West Virginia 25401
(304) 267-8985

Attorneys for Respondent, Nationwide Mutual Insurance Company

(3)

No. 02-1531

Supreme Court, U.S.
FILED
MAY 21 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LAURA A. FINDLEY, *et al.*,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF IN OPPOSITION

JUDITH K. MINTEL
STATE FARM INSURANCE COMPANIES
One State Farm Plaza
Bloomington, IL 61710
(309) 766-3520

LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

CATHERINE D. MUNSTER
JAMES A. VARNER
DEBRA TEDESCHI HERRON
MCNEER, HIGHLAND, MCMUNN, & VARNER L.C.
Post Office Drawer 2040
Empire Building
Clarksburg, WV 26302
(304) 626-1100

*Counsel of Record *Counsel for Respondent*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

19PP

QUESTION PRESENTED

Whether the state court below correctly applied its own state retroactivity law in accordance with this Court's precedents recognizing the authority of the States to determine the retroactive or prospective effect of their own rulings on matters of state law.

RULE 29.6 STATEMENT

Respondent State Farm Mutual Automobile Insurance Company is a mutual insurer owned by its policyholders. It has no parent corporations and no publicly held company owns 10% or more of its stock.

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

As the petition for certiorari candidly acknowledges, this case concerns "the application of decisions made by a state's highest court on a question of *state* law." Pet. 7 (emphasis added). Applying its own retroactivity law, the West Virginia Supreme Court of Appeals declined in this case to give retroactive effect to one of its own rulings on a matter of state insurance law. Among other things, the court concluded that retroactive application of its ruling would impose "augmented substantive liabilities that did not clearly exist prior to the announcement of" that ruling. Pet. App. 30-31. Petitioner argued that the court's prospective application of its ruling violated the federal Constitution, and that the court should follow federal retroactivity law instead. The court rejected that contention, and the present petition followed.

The petition should be denied. The decision below does not conflict with any of this Court's precedents. As this Court established long ago, "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). Nor does the decision below conflict with any federal court of appeals or state court decision. Indeed, each of the state court retroactivity cases cited in the petition recognize that the States are free to apply their own retroactivity rules to their own rulings on matters of state law. That is just what the state court below did.

STATEMENT OF THE CASE

In *Mitchell* v. *Broadnax*, 537 S.E.2d 882 (W. Va. 2000), the West Virginia Supreme Court of Appeals held that a provision in West Virginia's uninsured motorist statute allowed insurers to incorporate uninsured motorist exclusions in automobile insurance policies so long as insurers "adjust[ed] the corresponding policy premium so that the exclusion [was] consistent with the premium charged." *Id.* at 893 (quotation omitted). *See* W. Va. Code § 33-6-31(k). The court also held that insureds could pursue a cause of action against insurers to enforce that requirement. *Id.* Because the court was unable to determine from the record in that case whether the insurer had complied with the statutory requirement, the court remanded the case "for further proceedings consistent with [its] opinion." *Id.* at 894.

After *Broadnax* was issued, petitioner Laura A. Findley filed a putative class action in the circuit court of Barbour County, West Virginia, alleging, among other things, that respondent State Farm Mutual Automobile Insurance Company had incorporated exclusions in its policies without making corresponding adjustments to premiums. The circuit court granted summary judgment in favor of State Farm on numerous grounds. Among other things, the court concluded

that Findley did not have standing to assert a cause of action under *Broadnax*. *See* Pet. App. 3.

The West Virginia Supreme Court of Appeals affirmed the circuit court's ruling that Findley could not assert a cause of action under *Broadnax*. Pet. App. 33. Because the policy containing the language Findley sought to challenge was issued in 1991, the Court had to consider whether to "retroactively apply [its] holdings in *Mitchell* v. *Broadnax* so as to bring within its scope an insurance contract which was entered into before [the] Court's decision therein." Pet. App. 28. The court explained that "[w]hen such a request for retroactivity is made, we cautiously consider whether such retrospective application is indeed warranted." *Id*. The court then set forth its longstanding rule on retroactivity:

> "In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure form prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroac-

> tive/prospective question in the same area of the law in their overruling decisions." [Pet. App. 28-29 (quoting *Bradley* v. *Appalachian Power Co.*, 256 S.E.2d 879, 880-881 (W. Va. 1979)).]

Applying those criteria, the court held that its decision in *Broadnax* should not be applied retroactively to this case. "In short," the court held, "retroactivity is not warranted because our decision in *Mitchell* involved a matter of substantive law, namely W. Va. Code § 33-6-31(k), which had, prior to our decision therein, received sparse treatment in our judicial decisions and had not been amended by the Legislature since its original enactment in 1979." Pet. App. 29-30. "Given this dearth of interpretative authority," the court concluded, "it goes without saying that the holdings announced in *Mitchell* were not 'clearly foreshadowed.' " Pet. App. 30.

Moreover, the court held, "the substantial public policy issues implicated in our holdings, and explicitly identified by the Legislature in [the uninsured motorist statute], mitigate in favor of a rule of prospectiveness." *Id.* "Finally," the court concluded, "while we have long held exclusions in insurance policies to be valid, we had not, prior to *Mitchell*, delineated the express requirements therefor contained in [the statute]." *Id.* (footnote omitted). Thus, "in order to shield insurers from the imposition of augmented substantive liabilities that did not clearly exist prior to the announcement of" its holdings in *Broadnax*, the court "declined to apply [those] holdings * * * retroactively." Pet. App. 30-31.

Findley sought rehearing, arguing that the court erred as a matter of "federal constitutional law" by applying its own retroactivity law in deciding whether to give *Broadnax* prospective or retroactive effect. Pet. App. 77. In petitioner's view, the court was bound by this Court's precedents on federal retroactivity doctrine. The court denied her petition. *See* Pet. App. 67.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH THIS COURT'S CASES.

1. Petitioner contends that certiorari is warranted because the decision below conflicts with this Court's retroactivity decisions. She is quite mistaken. As Justice Cardozo observed more than a half century ago, "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Sunburst*, 287 U.S. at 364. "The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Id.* at 365. In other words, "[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their *own* decisions." *American Trucking Ass'ns, Inc.* v. *Smith*, 496 U.S. 167, 177 (1990) (O'Connor, J.) (plurality opinion) (emphasis added). That understanding is entirely in keeping with this Court's recognition of the coordinate—and co-equal—role of the States in our federal scheme.

Nothing in *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991), or *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993), is to the contrary. *See* Pet. 8-10. In *Beam*, the Supreme Court of Georgia declined to apply one of *this* Court's rulings retroactively to a case arising from facts predating that decision. A majority of this Court agreed, as a matter of *federal* retroactivity law, that this Court's application of its ruling in the decision announcing it required retroactive application of that ruling in all later cases. *See* 501 U.S. at 532 (plurality opinion); *id.* at 544 (opinion of Justice White); *id.* at 547 (opinion of Justice Blackmun); *id.* at 548 (opinion of Justice Scalia). *See also id.* at 535 ("the antecedent choice-of-law question is a *federal* one where the rule at issue itself derives from *federal* law, constitutional or otherwise") (plurality opinion) (emphases added); *id.* at 540 ("the question is whether it is error to

refuse to apply a rule of *federal* law retroactively, after the case announcing the rule has already done so") (plurality opinion) (emphasis added).

Similarly, in *Harper*, the Virginia Supreme Court twice refused to give retroactive effect to one of *this* Court's rulings. Again, the Court held, as a matter of *federal* retroactivity law, that "this Court's application of a rule of *federal* law to the parties before the Court requires every court to give retroactive effect to that decision." *See* 509 U.S. at 90 (emphasis added). *See also id.* at 97 ("When this Court applies a rule of *federal* law to the parties before it, that rule is the controlling interpretation of *federal* law and must be given full retroactive effect in all cases still open on direct review") (emphases added).

Neither *Beam* nor *Harper* presumes to have any effect on *state* retroactivity doctrine when it comes to the effect of *state* court decisions. Indeed, in *Harper*, the Court expressly recognized that state courts are free to apply their own retroactivity rules to their own decisions on matters of state law. In refusing to apply this Court's ruling retroactively, the Virginia Supreme Court had invoked its own "state-law retroactivity doctrine," which provided that " 'consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule.' " *Id.* at 99 (quoting *Fountain* v. *Fountain*, 200 S.E.2d 513, 514 (Va. 1973), *cert. denied*, 416 U.S. 939 (1974)). This Court held, however, that the Supremacy Clause "does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Id.* at 100. "*Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law* * * * cannot extend to their interpretations of federal law." *Id.* (emphasis added).

Quite unlike the state courts in *Beam* and *Harper*, the state court below did not refuse to give retroactive effect to one of this Court's decisions. Rather, the court merely applied its *own* retroactivity law to one of its *own* rulings on an issue of *state* law. That was entirely permissible under this Court's precedents, not to mention our constitutional design.

2. Petitioner's contention that *Beam* and *Harper* are premised on equal protection and due process grounds is also much mistaken. *See* Pet. 7, 9-10. To be sure, some of the Justices in *Beam* and the majority in *Harper* did refer to the principle of treating similarly situated litigants similarly. *See, e.g.*, 501 U.S. at 537, 547; 509 U.S. at 97. But neither decision held that retroactive application of this Court's rulings was compelled as a matter of equal protection or due process. To the extent members of the Court referred to equality principles, they did so solely as a matter of prudential considerations that, in their view, should govern constitutional adjudication in federal cases.

Writing for the plurality in *Beam*, for instance, Justice Souter stated that selective prospectivity "breaches the principle that litigants in similar situations should be treated the same." 501 U.S. at 537. But he was referring to that principle as "a fundamental component of *stare decisis* and the rule of law generally," not equal protection or due process, which are nowhere discussed in his opinion. *Id.* Indeed, as Justice Souter further explained, " '[w]e depart from this *basic judicial tradition* when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.' " *Id.* at 537-538 (quoting *Desist* v. *United States*, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting) (emphasis added).

In his opinion concurring in the judgment, Justice Blackmun also stated that "selective application of new rules violates the principle of treating similarly situated defendants

the same." *Id.* at 547. But he, too, "derive[d]" that principle "from the integrity of judicial review," not any constitutional mandate of equal protection or due process. *Id.* And while Justice Scalia, also concurring in the judgment, opined that selective prospectivity is "not allowed by the Constitution," *id.* at 548, he meant by Article III, not the Fifth Amendment's Due Process Clause or its equal protection component. *Id.* at 549.

In *Harper*, the Court noted that it was "mindful" of the " 'basic norms of constitutional adjudication' that animate[] [its] view of retroactivity in the criminal context." 509 U.S. at 97. The Court cited in that regard its decision in *Griffith* v. *Kentucky*, 479 U.S. 314, 323 (1987), which observes that "selective application of new rules violates the principle of treating similarly situated defendants the same," but nowhere states that selective prospectivity violates equal protection or due process. The Court also cited Justice Stevens's dissent in *American Trucking, supra*. *See* 509 U.S. at 97. But in stating that the Court had no constitutional authority "to treat similarly situated litigants differently," Justice Stevens did not invoke notions of equal protection or due process. 496 U.S. at 214. His view, too, was based on "legal principle" and "[f]undamental notions of *fairness* and *legal process*." *Id.* at 212, 214 (emphases added).

In recognizing long ago that state courts are free to apply their own retroactivity rules to state law decisions, this Court observed: "[W]e are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or the meaning of the judicial process." *Sunburst*, 287 U.S. at 366. *See also id.* at 364 ("We think the federal constitution has no voice upon the subject."). Nothing in this Court's later decisions even remotely suggests a departure from that settled precedent.

II. THERE IS NO CONFLICT IN THE STATE COURTS.

1. Although petitioner alleges a conflict among the state courts, each of the retroactivity cases cited in the petition as in conflict with the decision below are in fact in complete agreement that state courts may apply their *own* retroactivity law to rulings on questions of *state* law. *See* Pet. 13-15. In *State* v. *Baird*, 654 N.W.2d 105 (Minn. 2002), for example, the Minnesota Supreme Court decided, as a matter of its own retroactivity law, that its ruling on an issue of state criminal law in an earlier case applied retroactively to the case before it. In reaching that conclusion, the court noted that "[g]enerally, our rulings are given retroactive effect," but "[w]e have followed the lead of the United States Supreme Court, however, in making certain limited exceptions to the general rule." *Id.* at 110. Following the lead of this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), for example, the court had adopted a special circumstances test for retroactivity in civil cases. *Id.* at 111.

The court observed that "[t]he rationale behind the special circumstances test is that, in some cases, the disruptive effect retroactivity has on parties and their individual situations outweighs the countervailing interest in treating all similarly situated parties alike." *Id.* at 112. The court held, however, that the special circumstances test was "ill-suited to the present criminal case," where such concerns were not implicated. *Id.* Noting that "[i]t seems patently unfair to us to apply different rules to * * * two similarly situated defendants * * * simply because [one's] appeal reached us first," the court "decline[d] to apply the special circumstances test to the instant case." *Id.* at 113. Thus, in *Baird* the court not only applied its own retroactivity law, but made clear that in Minnesota selective prospectivity in civil cases is alive and well.

Likewise, in *State* v. *Garcia*, 29 P.3d 919 (Hawaii 2001), the Supreme Court of Hawaii applied its own retroactivity

law in holding that its ruling on an issue of state criminal law in an earlier case applied retroactively to all cases not yet final at the time it was issued. Indeed, the court expressly confirmed its ability to apply its own retroactivity law, emphasizing that "[w]e adhere to the view that '[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.' " *Id.* at 930 (quoting *American Trucking*, 496 U.S. at 177). As the court explained, "the development of our law on retroactivity has paralleled that of the federal cases in large respect." *Id.* Taking its cue from this Court, the court held that "when [we] announce[] a new rule that benefits a defendant and appl[y] the rule to the defendant in the case in which the rule is announced," the rule must be applied to all cases on direct review or not yet final at that time. *Id.* at 933 (citing *Griffith*, 479 U.S. at 328). Thus, the court decided to follow this Court's retroactivity doctrine in criminal cases, but *only* as a matter of its *own* retroactivity law. *See id.* at 932 n.19 (noting that this Court's precedents "would not appear to mandate that the states retroactively apply a new constitutional rule for criminal cases unless the rule was applicable to the states through the fourteenth amendment").

Davis v. *Moore*, 772 A.2d 204 (D.C. 2001), is to the same effect. There, the D.C. Court of Appeals also chose, as a matter of its own retroactivity law, to follow this Court's precedents in holding that a rule announced in an earlier decision applied retroactively to authorize the recomputation of certain criminal sentences calculated before that decision was issued. *Id.* at 226-227. The court recognized the distinction between federal and state retroactivity law, noting that it was "bound to follow *Griffith* and *Harper* in any case involving a new rule of federal law." *Id.* at 226 n.22. Because the court chose to "conform [its] jurisprudence to that of the Supreme Court," *id.* at 230, it concluded that

Griffith and *Harper* "mandate[d] retroactive application" in that case. *Id.* at 231. *See* Pet. 13.

2. Contrary to petitioner's assertion, not one of the state retroactivity cases cited in the petition "recognize that the application of a judicial decision on a selective basis presents federal constitutional problems." Pet. 13.[1] In *Baird*, the court held that applying different rules to two criminal defendants, merely because one appeal "reached [the court] first," 654 N.W.2d at 113, "would be to treat similarly situated criminal defendants differently." *Id.* at 112. The court never suggested, however, that giving prospective effect to a decision on a selective basis would amount to a federal constitutional violation. Indeed, as discussed, *Baird* makes clear that the court may apply selective prospectivity in the civil context, because "in some cases, the disruptive effect retroactivity has on parties and their individual situations *outweighs the countervailing interest in treating all similarly situated parties alike*." *Id.* (emphasis added).

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[1] Petitioner cites two decisions from California's intermediate court of appeals. *See* Pet. 14-15. Neither of those cases involved the determination of whether to give a ruling prospective or retroactive effect, but rather a quite unrelated issue—the validity of provisions of the California Rules of Court governing the publication of appellate opinions. *See Schmier* v. *Supreme Court*, 93 Cal. Rptr. 2d 580 (Ct. App.), *review denied*, No. S087534 (Cal.), *cert. denied*, 531 U.S. 958 (2000) (*Schmier I*); *Schmier* v. *Supreme Court*, 117 Cal. Rptr. 2d 497 (Ct. App. 2002) (*Schmier II*). Contrary to petitioner's assertion, the court in *Schmier I* did not "recognize[] that *Harper* and *Beam* are premised upon Due Process and Equal Protection grounds." Pet. 14. That was merely what the plaintiff had argued. *See* 93 Cal. Rptr. 2d at 585. In *Schmier II*, the court noted in dicta that selective prospectivity "*can* violate the constitutional guarantees of due process and equal protection." 117 Cal. Rptr. 2d at 502 n.4 (emphasis added). The plaintiff—and losing party—in *Schmier II* did not seek review of that decision in the California Supreme Court.

Likewise, in *Garcia*, the court also concluded that "selective application of new rules violates the principles of treating similarly situated defendants the same." 29 P.2d at 933 (quotation omitted). The equality principles invoked by the court were not rooted in the Equal Protection or Due Process Clauses, however, but rather the "ideal of administration of justice with an even hand." *See id.* (quotation omitted). The court's decision, moreover, does not purport to address selective prospectivity in the *civil* context.

Nor did the court in *Davis* suggest that selective prospectivity raises "federal constitutional problems." Indeed, the court observed that several provisions of the federal Constitution may in fact "preclude retroactive application of a rule of law." 772 A.2d at 229. Among the provisions the court identified as "embody[ing] antiretroactivity principles" was the Due Process Clause, *id.* at 229, which " 'protects the interests in fair notice and repose that may be compromised by retroactive legislation.' " *Id.* at 230 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994)). Yet petitioner nonetheless ascribes to that court the conclusion that retroactive application of its ruling was compelled by the Due Process Clause.

* * *

The West Virginia Supreme Court of Appeals declined to apply its holdings in *Broadnax* to this case because, among other things, it determined that it would not be fair to impose on insurers "augmented substantive liabilities that did not clearly exist prior to the announcement of" those holdings. Pet. App. 30. The fact that the court's holdings in *Broadnax* may have been applied in *Broadnax* itself does not justify a different result, because the court would "only [have] hinder[ed] the cause of fairness by repeating the mistake." *Beam*, 501 U.S. at 551 (O'Connor, J., dissenting). This Court may have a different rule on selective prospectivity with respect to its own decisions, but the state court below

was free to determine, as a matter of its own retroactivity law, that it would not be fair to apply *Broadnax* retroactively in this case. That case-specific conclusion does not merit this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JUDITH K. MINTEL
STATE FARM INSURANCE COMPANIES
One State Farm Plaza
Bloomington, IL 61710
(309) 766-3520

LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

CATHERINE D. MUNSTER
JAMES A. VARNER
DEBRA TEDESCHI HERRON
MCNEER, HIGHLAND, MCMUNN, & VARNER L.C.
Post Office Drawer 2040
Empire Building
Clarksburg, WV 26302
(304) 626-1100

*Counsel of Record

Counsel for Respondent

Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

No. 02-1531

In The
Supreme Court of the United States

LAURA A. FINDLEY, et al.,

Petitioners,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MALAKOFF DOYLE & FINBERG, P.C.
MICHAEL P. MALAKOFF
Counsel of Record
JAMES M. PIETZ
Suite 200, The Frick Building
437 Grant Street
Pittsburgh, PA 15219
(412) 281-8400

WILSON FRAME BENNINGER & METHENEY, P.L.L.C.
J. MICHAEL BENNINGER
PAUL T. FARRELL, JR.
151 Walnut Street
Morgantown, WV 26505
(304) 292-9429

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Respondents' Briefs In Opposition to the Petition For Certiorari illustrate the compelling reasons that Certiorari should be granted. The Petition argues that Certiorari should be granted to address whether the Due Process and Equal Protection Clauses of the United States Constitution apply to limit the use of "selective prospectivity" by a state's highest court in applying its own retroactivity doctrine. This Court, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993), held that the practice of "selective prospectivity" in the application of a rule of federal law violated "basic norms of constitutional adjudication."

Respondents argue that this prohibition cannot be extended to state courts because a state's highest court, in its coordinate, co-equal role within the federal system, enjoys absolute, inherent power to decide and apply state law. An important question of federal constitutional law is therefore presented: Does a state's highest court have absolute, inherent power to apply a decision on a question of state law selectively to similarly situated litigants without regard to federal constitutional limitations? As the Petition demonstrates, widespread disagreement on this question exists within the state courts. It is respectfully submitted that Certiorari be granted to address this important systemic question.

THE BRIEFS FURTHER DEMONSTRATE A SUBSTANTIAL CONSTITUTIONAL QUESTION AS TO WHETHER A STATE COURT'S JUDICIAL RETROACTIVITY DOCTRINE IS SUBJECT TO FEDERAL CONSTITUTIONAL LIMITATIONS

Respondents maintain that the states' highest courts have absolute, unlimited freedom to craft their own judicial retroactivity doctrine relying on *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932). Yet, this Court has repeatedly held that state courts are bound by the federal constitutional limitations of the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings v. Hill,* 281 U.S. 673, 682 (1930) (" . . . while it is for the state courts to determine the adjective as well as the substantive law of the state, they must in doing so, accord the parties due process of law"); *Shelley v. Kraemer,* 334 U.S. 1, 15 (1948) quoting Justice Brandeis in *Brinkerhoff-Faris*, 281 U.S. at 680 ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."). As this Court recently explained in *Alden v. Maine,* 527 U.S. 706, 755 (1999), the principle of state sovereignty is limited by the prohibitions of the Fourteenth Amendment. *See also Ex parte State of Virginia,* 100 U.S. 339, 346-348 (1880) explaining this limitation on state sovereignty:

> But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent . . . But the Constitution now expressly gives authority for congressional interference and compulsion in cases embraced within the Fourteenth Amendment. It is but a limited

> authority, true, extending only to a single class of cases; but within its limits it is complete.

And see Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976).

This Court's decision in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) does not resolve the question whether a state court's use of "selective prospectivity" in its retroactivity doctrine is immune from Fourteenth Amendment limitations. The advent of "selective prospectivity" did not occur until well after *Sunburst* was decided. It had its origin in the 1960s in the criminal procedure context and finally its demise under federal law in the civil context in 1991 in *Beam*. 501 U.S. at 537. ("This method, which we may call modified, or selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused."). *Sunburst* involved a state court's use of a "purely prospective" method of overruling. 287 U.S. at 361. As noted in *Beam,* a purely prospective method has been accepted in general, but applied "infrequently." 501 U.S. at 536. Under *Sunburst,* therefore, a state's highest court is free to decide whether one of its decisions may be given retroactive or purely prospective effect. Thus, this Court in *American Trucking Ass'ns, Inc. v. Smith,* 496 U.S. 167, 177 (1990) recognized that "... state courts *generally* have the authority to determine the retroactivity of their own decisions." (emphasis added). However, this Court has never addressed whether the Due Process and Equal Protection Clauses limit the power of state courts to utilize "selective prospectivity" in the application of its retroactivity doctrine.

Clearly, the oppositions' reading of the *Sunburst* doctrine to provide absolute power to state courts to apply state law without regard to any federal constitutional limits appears to conflict with this Court's decisions in *Brinkerhoff-Faris, Shelley* and *Ex parte Virginia.* This conflict further demonstrates that this Court should grant Certiorari in this matter.

The opposition briefs also obfuscate the federal question presented by portraying it as one of construction of state law. Petitioner's question is solely concerned with whether the selective *application* of the construction of W.Va. Code § 33-6-31(k) ("subsection (k)") comports with federal due process and equal protection standards. Petitioner does not attack any construction of state law by the court below.

The state court below in *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000) had already construed subsection (k), a provision of West Virginia underinsured motorist law, to provide a cause of action for insureds and then applied the construction retroactively. Based upon this construction, Petitioner asserted the same cause of action. On appeal, the state court below reversed course and determined that its construction of subsection (k) in *Mitchell* was to be applied only prospectively from the date of the *Mitchell* opinion. At the same time, the state court below also held that a new law, W.Va. Code § 33-6-30(b-c) ("HB 4670"), which was enacted to purportedly retroactively overrule the *Broadnax* decision was a substantive law that could not be applied retroactively to bar causes of action based upon the *Broadnax* decision. App. 70-73. The state court below therefore ruled that the *Mitchell* decision applied only to exclusions added to policies of insurance between February 18, 2000, the date of the *Broadnax*

decision and June 7, 2002, the date that HB 4670 was enacted. Because Petitioner's cause of action was based upon exclusions added before this "window period," the state court below said she lacked standing even though the similarly situated plaintiff in *Broadnax* was recognized to have standing. It is this *selective application* of the construction of subsection (k) which raises the federal constitutional question, not the construction itself.

Respondent Nationwide, thus, misstates the holding of the lower court in an effort to avoid the federal constitutional question. Nationwide states that the court below construed the recently enacted HB 4670, the law passed in 2002, to purportedly "overrule" *Broadnax,* to have retroactive effect so as to bar Petitioner's claims. Nationwide Opp. at p. 7. Actually, the state court below held that HB 4670 could only be applied prospectively. Therefore, Petitioner does not dispute or argue with this construction of HB 4670 and it has no relevance to the question presented here.

Nor does Petitioner question the inherent power of the West Virginia Supreme Court of Appeals to craft its own retroactivity doctrine. The state court below enjoys the power to craft a doctrine which allows full retroactive effect or purely prospective effect. However, once the Court makes the retroactive or prospective election in the decision announcing the rule, that decision must be applied to all similarly situated litigants as required by the limitations of the due process and equal protection clauses. Thus, Petitioner presents a question of federal law as explained in *Brinkerhoff-Faris v. Hill,* 281 U.S. 673, 682 (1930) ("We are not now concerned with the rights of the plaintiff on the merits, . . . or with the accuracy of the state court's construction of the statute . . . Our present

concern is solely with the question whether the plaintiff has been accorded due process in the primary sense . . . ").

CONCLUSION

Wherefore, it is respectfully requested that this Honorable Court accept Certiorari.

Respectfully submitted,

MALAKOFF DOYLE & FINBERG, P.C.
MICHAEL P. MALAKOFF
Counsel of Record
JAMES M. PIETZ
Suite 200, The Frick Building
437 Grant Street
Pittsburgh, PA 15219
(412) 281-8400

WILSON FRAME BENNINGER & METHENEY, P.L.L.C.
J. MICHAEL BENNINGER
PAUL T. FARRELL, JR.
151 Walnut Street
Morgantown, WV 26505
(304) 292-9429

Attorneys for Petitioners

Dated: May 30, 2003